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No. .....

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In The

# Supreme Court of the United States

October Term, 1988

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GRANITE ROCK COMPANY, a corporation,

*Petitioner,*

vs.

BUILDING MATERIALS AND CONSTRUCTION TEAMSTERS LOCAL 216,

*Respondent.*

—o—

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

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## QUESTIONS PRESENTED

In collective bargaining agreements which limit arbitration to disputes arising under the contract, does the issue of arbitrability become conclusively established in favor of arbitration by a party's mere assertion that through an implied covenant a grievance arises under the contract?

If the answer is "no," what is the minimum contact necessary between the collective bargaining agreement and the underlying dispute which must be demonstrated so as to give the arbitrator jurisdiction to decide the matter?

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GRANITE ROCK COMPANY, a corporation,
*Petitioner,*

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BUILDING MATERIALS AND CONSTRUCTION TEAMSTERS LOCAL 216,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, in *Building Materials and Construction Teamsters Local No. 216 v. Granite Rock Company, a corporation.*

## OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 851 F.2d 1190 (9th Cir. 1988), and is reproduced in Ap-

pendix A, *infra*, A-1 through A-18. The original and amended Opinions of the District Court are unreported, and are reproduced in Appendices B and C, *infra*, A-19 through A-42. The Decision and Order of the National Labor Relations Board is reproduced in Appendix D, *infra*, A-43 through A-48.

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## JURISDICTION

The decision of the Court below issued on July 11, 1988. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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## STATUTORY PROVISIONS INVOLVED

The relevant provision of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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## STATEMENT OF THE CASE

Petitioner Granite Rock Company (herein "Granite Rock") is a corporation which operates numerous facilities in and about Northern California, including a concrete batch plant in San Jose.[1] Granite Rock is a member of the Aggregates and Concrete Association of Northern California, Inc. (herein "ACA"). ACA is a multi-employer collective bargaining organization of which Granite Rock and several other Bay Area aggregate and concrete companies are members. The terms and conditions of employment for the ready-mix truck drivers at Granite Rock's San Jose plant are established by "the ACA Agreement," a multi-employer, multi-union collective bargaining agreement. The employees at Granite Rock's San Jose batch plant are represented by Teamsters Local 287, which also represents other ready-mix truck drivers in Santa Clara County, California.[2]

Respondent Building Materials and Construction Teamsters Local 216 (herein "Union") is also a party to the ACA Agreement. The Union represents ready-mix truck drivers in the California counties of San Francisco and San Mateo. The Union represents no employees of Granite Rock.

Central Supply Corporation is a California corporation which presently does business under the name of Harbor Ready-Mix (herein "Harbor"). Harbor is a sep-

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1 Pursuant to Rule 28.1 of the Rules of the Supreme Court of the United States, Granite Rock certifies that it has no corporate parents, subsidiaries or affiliates.

2 Teamsters Local 287 is *not* the Respondent in this matter.

arate legal entity from Granite Rock, and commenced operations as a ready-mix concrete plant in San Mateo County in the summer of 1985.

On August 8, 1985, the Union filed a grievance, alleging that the ACA Agreement should be applied to the employees at Harbor, based on the claim that Harbor and Granite Rock were "*alter egos.*" ACA did not process the grievance in that Harbor was not an ACA member. Because the grievance raised a potential issue regarding the relationship between the employees at the two companies as well as the coverage of the ACA Agreement, Granite Rock filed a unit clarification petition with the National Labor Relations Board.

After a two-day full evidentiary hearing, the Board determined that Granite Rock and Harbor were neither a single employer nor were they *alter egos* of one another. In reaching its decision, the Board made the following findings of fact:

(1) "Harbor is not . . . and never has been either a member of ACA or a signatory to any collective bargaining agreement with the Union";

(2) Harbor is administered and operated by a general manager who makes business and labor relations decisions without review or approval by Granite Rock;

(3) the "nature and purpose of the respective business operations" of Harbor and Granite Rock are "unalike";

(4) the job duties of ready-mix truck drivers at Granite Rock San Jose are different from the job duties of Harbor employees;

(5) Granite Rock and Harbor share "no common personnel";

(6) there is no "exchange of employees" between the two companies;

(7) "all business transactions between the two entities have been at arm's length"; and

(8) with limited and inconsequential exceptions, Granite Rock "plays no role in Harbor's business and personnel decisions."

(App. A-45 - A-47)

The Board further held that Granite Rock's involvement with Harbor was limited to making available to Harbor a line of bank credit to facilitate its startup of operations. Although the two entities share common investors, the percentage of ownership in each operation varies. Based on these facts, the Board ordered that the bargaining unit of Granite Rock ready-mix truck drivers be clarified to exclude all Harbor employees. (App. A-47 - A-48)

Prior to the NLRB ruling, the Union initiated federal court litigation which ultimately resulted in the instant application for certiorari. The litigation commenced when the Union filed a petition to compel arbitration of its *alter ego* grievance pursuant to the grievance/arbitration procedure of the ACA Agreement. Later, when the NLRB determined that Harbor employees should *not* be included in the unit containing Granite Rock's employees, the Union changed its position and argued to the District Court that Granite Rock violated the ACA Agreement by breaching an implied covenant precluding Granite Rock from double-breasting (operating both union and nonunion entities) or "establishing" Harbor without applying the hiring and

economic provisions of that Agreement to Harbor's employees.[3] The Union argued that this revised grievance must be sent to arbitration. Initially, the District Court accepted the Union's argument and ordered arbitration on the issue of whether Granite Rock violated the Agreement by failing to apply the hiring and economic provisions of the ACA Agreement to Harbor's employees.

Granite Rock moved to alter the judgment of the District Court based, *inter alia*, on the fact that the implied covenant upon which the court ordered arbitration would violate section 8(e) of the National Labor Relations Act. Thereafter, the Union again redefined its grievance, arguing instead that the violated implied covenant encompassed only certain portions of the hiring provisions of the Agreement.

The District Court granted in part and denied in part Granite Rock's motion. The District Court continued to order arbitration but modified its original decision to redefine the issue. It directed Granite Rock and the Union to submit to an arbitrator the following issue:

> [w]hether [Granite Rock] has violated the collective bargaining agreement between the parties by establishing Harbor Ready Mix to compete with other employers covered by the [ACA] agreement without conforming to the economic provisions of that agreement.

(App. A-29)

Granite Rock appealed the District Court's decision to the Ninth Circuit on three theories: (1) the court im-

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[3] The Union's Complaint was not amended to reflect this change in the nature of the grievance over which the Union sought to compel arbitration. Rather, the Union first advanced this argument in its summary judgment papers.

properly deferred the issue of arbitrability to the arbitrator; (2) the doctrine of collateral estoppel precluded relitigation in arbitration of the issues decided by the NLRB; and (3) an arbitration award in favor of the Union's position would violate section 8(e) of the National Labor Relations Act or public policy.[4] The Ninth Circuit summarized Granit Rock's argument concerning arbitrability as follows:

> . . . [I]f employers can be required to arbitrate *any* dispute involving an implied covenant, without a showing that the covenant can reasonably be inferred from the provisions of the agreement, arbitrators will possess unlimited, unintended, and virtually unreviewable power to read a variety of implied covenants into every collective bargaining agreement. Looking to the circumstances of the instant case, Granite Rock argues that because the *only* evidence that the union presented in support of its alleged implied covenant was the agreement itself, and because the express provisions of the agreement provided absolutely no basis for implying such a covenant, the union's claim for arbitration must necessarily fail. (emphasis in original)

(App. A-11)

The Ninth Circuit held that Granite Rock had waived its right to assert this argument by entering into a collective bargaining agreement requiring submission of all disputes *arising under* the contract to arbitration. As stated by the Court:

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[4] Through this petition for writ of certiorari, Granite Rock seeks review of the Ninth Circuit's decision as it relates to the issue of arbitrability of grievances. While Granite Rock does not agree with the Ninth Circuit's holding on other defenses raised, only the arbitrability issue is addressed herein.

> It is, however, too late in the day for Granite Rock to argue that a court must first determine that there is some merit to the union's claims before ordering the parties to arbitrate their dispute. The district court was not required to determine whether the union's claim rested on a 'plausible' reading of the agreement. By providing that '[a]ll disputes arising under this agreement' shall be resolved through arbitration the parties agreed 'to submit *all* grievances to arbitration, not merely those which the court will deem meritorious.' *American Manufacturing*, 363 U.S. at 568 (emphasis added).

(App. A-10)

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## REASONS FOR GRANTING THE WRIT

This case presents an important question concerning arbitrability not answered by the court in *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643 (1986): Whether a court is required to look beyond the naked allegation contained in a grievance to determine if the dispute *arises under* the collective bargaining agreement. The Ninth Circuit held that the mere existence of a standard arbitration clause coupled with the mere assertion that the contract has been violated is sufficient to mandate arbitration.[5] The Ninth Circuit's decision directly conflicts with the decisions of the Third and Eleventh Circuits which require a

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[5] Section 18 of the parties' collective bargaining agreement contains an arbitration clause providing "all disputes *arising* under this agreement" (emphasis added) are to be arbitrated. Because the clause is of the type routinely found in collective bargaining agreements, it will be referred to herein as a "standard arbitration clause."

court to examine the substance of a grievance to determine whether the dispute to be resolved *arises from* the contract, thereby warranting arbitration. Resolution of this basic issue of arbitrability is crucial to the maintenance of a unified federal labor policy. Left unresolved, grievances artfully pled will uniformly be sent to arbitration by the Ninth Circuit, while rejected in other Circuits. Existence of a lower and easily circumvented threshold standard of arbitrability in the Ninth Circuit will undoubtedly lead to unnecessary problems in the interpretation and application of collective bargaining agreements.

The very issue ordered arbitrated in the instant case is illustrative of the type of problem created by the conflict in arbitrability standards. Here, an "implied" covenant preventing double-breasting by a unionized company has been sent to arbitration without a judicial determination that the dispute *does* "arise" under the contract.

By simply wording a grievance to claim violation of an implied covenant, a party is free to arbitrate virtually any issue, including those a party never intended to arbitrate. This outcome overturns long-standing federal labor precedent and undermines the arbitration process.

Two immediate and profound disruptions are occurring as a result of the Ninth Circuit's decision. First, employers with heretofore legally separate union and non-

union entities are faced with the unexpected prospect of arbitrating the existence of the newly discovered implied covenant prohibiting double-breasting. Multimillion-dollar exposures, expanded discovery obligations and uncertainty over current contractual obligations are resulting.

Second, faced with the prospect of being required to arbitrate such extra contractual issues as double-breasting, investment policies and other fundamental business decisions, employers will undoubtedly abandon standard arbitration clauses in favor of extremely restrictive arbitration provisions. As a result, the labor stability provided by collective bargaining agreements will be severely eroded. Rather than resolve all disputes arising under a contract through arbitration, the parties would be forced to resort to self-help or judicial intervention to resolve their differences. Rather than expanding the use of arbitration in labor disputes it is expected that the role of arbitration will be sharply curtailed.

## I. The Ninth Circuit's Decision Conflicts With The Prior Decisions Of This Court And The Decisions Of The Third And Eleventh Circuits.

Historically, arbitrability has turned on one fundamental issue: Did the parties intend to arbitrate the dispute in question? Only if this question could be answered affirmatively would arbitration be ordered. This rule, first set forth by the Supreme Court in the *Steelworkers Trilogy, United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); and *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) has been universally

adopted by the federal courts, *e.g., Hotel and Restaurant Employees, and Bartenders Union, Local 703 v. Williams*, 752 F.2d 1476, 1478 (9th Cir. 1985): "The court must determine if the parties agreed to arbitrate *the issue in dispute*" (emphasis added); *IBEW Local 4 v. Radio Thirteen-Eighty, Inc.*, 469 F.2d 610, 614 (8th Cir. 1972): "Where the contract is not susceptible to a construction that the parties had agreed to arbitrate *the dispute in question*, arbitration will not be ordered" (emphasis added); *Independent Petroleum Workers v. American Oil Co.*, 324 F.2d 903, 906 (7th Cir. 1963) *aff'd*, 379 U.S. 130 (1964): "The question for decision remains as to whether the parties have obligated themselves by contract to submit *the grievance in dispute to arbitration*" (emphasis added).

In its recent decision in *AT&T Technologies*, the Supreme Court reaffirmed this principle, citing the *Steelworkers Trilogy:*

> The first principle gleaned from the Trilogy is that 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit' *Warrior & Gulf, supra*, at 582, 4 L. Ed. 2d 1409, 80 S. Ct. 1347; *American Mfg. Co., supra*, at 570-571, 4 L. Ed. 2d 1403, 80 S. Ct. 1343 (Brennan, J. concurring). This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration. *Gateway Coal Co. v. Mineworkers*, 414 U.S. 368, 374, 38 L. Ed. 2d 583, 94 S. Ct. 629 (1974).

475 U.S. 643, 648-649.

The court's focus in *AT&T Technologies* was on the issue of exclusionary language in a contract which would militate against arbitrating a particular dispute. There,

the court held that the interpretation of such language, as well as all arbitrability issues, are unmistakably a matter for judicial determination.[6] Yet, the court left open the issue of the degree of judicial scrutiny appropriate in making a determination that the parties intended to submit a particular grievance to arbitration.

In this case, the Ninth Circuit ordered the disputed grievance to arbitration based solely on the naked allegation of the Union that the dispute "arose under the collective bargaining agreement." Absolutely no evaluation of the agreement itself was undertaken by the court, other than to note that the contract contained a standard labor arbitration clause.

In essence, the Ninth Circuit held that the existence of a standard arbitration clause relieves the court of the burden of looking beyond that provision in determining arbitrability of any grievance which purports to articulate a contract violation. According to the Ninth Circuit, when a party to a collective bargaining agreement agrees that "all disputes arising under the agreement" are arbitrable, it follows *as a matter of law* that arbitration is required whenever a party asserts that another party breached its collective bargaining agreement.[7] The Ninth Circuit's an-

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[6] The sole exception to federal court jurisdiction to determine arbitrability exists where the parties "clearly and unmistakably" provide that an arbitrator shall have the power to determine arbitrability. *AT&T Technologies,* 475 U.S. 643, 649. No such provision exists in the ACA agreement.

[7] It should be noted that the arbitration clause of the ACA Agreement is not as broad as arbitration clauses in other collective bargaining agreements. In *Borden, Inc. v. Ameri-*

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alysis is in direct conflict with decisions of the Third and Eleventh Circuits which require the court to look beyond the conclusory allegations of a grievance in order to determine whether the contract provides a basis for invoking the jurisdiction of the arbitrator.

### A. The Ninth Circuit Ruling Conflicts With A Ruling Of The Third Circuit.

The Ninth Circuit decision is in direct conflict with the Third Circuit decision in *Morristown Daily Record v. Graphic Communications Union, Local 8N*, 832 F.2d 31 (3d Cir. 1987). There, the court found that a District Court judge had improperly referred the issue of arbitrability to an arbitrator. The union in *Morristown* had grieved the termination of Mr. Forbes, an employee who had worked for only two nights in the pressroom. The company contended that Forbes was only a substitute journeyman, was therefore an "applicant" for permanent employment, and that the refusal of the Company to retain Forbes was a nongrievable hiring decision. The Union contended that Forbes was a regular journeyman and therefore was an "employee," entitled to contractual protection from arbitrary discharge.

The Third Circuit noted that the question of arbitrability needed to be addressed because the collective

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*can Arbitration Assn*, 677 F. Supp. 248 (D. Del. 1988), the court construed a contract clause which required arbitration of "all differences, disputes, complaints and grievances *of whatever nature* that may arise between the Union and the Company." *Id.* at 250 (emphasis in original). The *Borden* court noted that the arbitration clause did not limit arbitrable issues to those arising under the collective bargaining agreement. *Id.* at 252 n.7.

bargaining agreement did not define the key term "applicant," and did not specify the procedure for classifying an individual as an "applicant" or an "employee." *Id.* at 34. The court ruled that: "*AT&T Technologies* holds that in such circumstances the courts shall determine whether the parties agreed to submit a disputed issue to arbitration." *Id.*

The standard for determining arbitrability established by the Third Circuit in *Morristown* is in conflict with the Ninth Circuit's ruling in this case.

Specifically, the Third Circuit held:

> Courts must carefully analyze the contractual language to determine whether a particular dispute is arbitrable. Although answering that question may entail some probing of preliminary substantive issues, that requirement will not relieve courts of the duty to decide arbitrability. *Id.* at 33-34.
>
> *We rejected the proposition that the phrasing of a grievance provides the basis for deciding arbitrability. . . . the test for arbitrability properly focuses on the substance of the grievance.* *Id.* at 34.

(Emphasis added.)

The Third Circuit remanded the case to the District Court for determination, by referral to extrinsic evidence if necessary, of whether the disagreement over Forbes' status was arbitrable. The Third Circuit faulted the District Court for failing to make "factual findings" on the question of whether the dispute was excluded from arbitration. *Id.* at 35.

The issue in *Morristown* would clearly have been decided differently had the case arisen in the Ninth Cir-

cuit. In the Ninth Circuit's view, the fact that the *Morristown* contract contained a standard arbitration clause, coupled with the union's claim in its grievance that an employee's contractual rights had been violated, would have been sufficient to trigger an obligation to arbitrate. Conversely, had the Third Circuit's arbitrability standard been applied to the facts in the instant case, the matter would undoubtedly have been remanded back to the District Court to make factual findings on the question of whether the dispute "arose under" the contract and was, thus, arbitrable.

### B. The Ninth Circuit Decision Conflicts With A Ruling Of The Eleventh Circuit.

In *Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 827 F.2d 709 (11th Cir. 1987), the Eleventh Circuit reviewed a District Court order compelling arbitration of three separate grievances. The court affirmed that two of the grievances were indeed arbitrable, but reversed the order compelling arbitration on the third grievance.

In the grievance found to be not arbitrable, the union alleged that a series of intervening negotiations had not terminated the union's power to accept an offer to extend an existing collective bargaining agreement. The Eleventh Circuit reviewed the contract language, which contained detailed procedures for presenting counter-proposals, time limits for making counter-proposals, and language concerning the effect of the failure to make a counter-proposal. The court then noted:

> The collective bargaining agreement is silent on the time in which a proposal is to be accepted, the man-

> ner of acceptance or any other aspect of acceptance. Thus, the question whether the intervening negotiations terminated the Union's power of acceptance is not on its face governed by the contract. *Id.* at 714.

The court continued:

> The parties' broad arbitration clause is not limitless. The presumption favoring arbitration, *AT&T Technologies*, 106 S.Ct. at 1419, cannot swallow the underlying foundation for arbitration: the dispute to be arbitrated must 'involve construction of the substantive provisions of the contract.' *Id.*

Finally, because the contract was silent on the operative question at issue, the Eleventh Circuit determined that the dispute was not arbitrable:

> The collective barbaining agreement creates no obligations concerning acceptance. There are no terms or provisions to be construed regarding acceptance. There simply is no dispute as to the construction of a clause of the contract with regard to acceptance because no such clause exists. *Id.*

Again, the material facts of the instant case closely parallel the facts in *Montgomery Mailers' Union*. Here, no contractual term exists which requires interpretation.[8]

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[8] The rule accepted by *Morristown* and *Montgomery Mailers' Union* also finds support in a decision of a California Court of Appeal. In *Graphic Arts Int'l Union, Local No. 280 v. Oakland National Engraving Co.*, 185 Cal. App. 3d 775, 780, the court held:

> The Union's argument is basically that, because a court when considering whether to order arbitration does not reach the merits of a grievance conclusory allegations that a collective bargaining agreement has been violated are sufficient. We cannot agree. It is true that 'in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court

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Nor has either court which has considered this case made any factual finding that the covenant the Union seeks to arbitrate is based on or arises from the language of the Agreement. Without such a foundation, it is clear that the instant dispute would not have been sent to arbitration had the matter arisen in the Eleventh Circuit.

### C. The Conflict In The Circuit Courts Demonstrates The Need For The Supreme Court To Clarify Application Of Its Previous Opinions Concerning Arbitrability.

The Ninth Circuit's decision when contrasted to those of the Third and Eleventh Circuits demonstrates contradictory approaches in applying the arbitrability standards first enunciated by the Supreme Court in the *Steelworkers Trilogy* and later in *AT&T Technologies.* At the heart of this disagreement is the inherent difficulty in striking a balance between the Court's obligation to determine arbitrability and its obligation to refrain from determining the merits of the dispute. This Court has reaffirmed the requirement for a judicial determination of whether the parties intended to submit a dispute to arbitration. *AT&T Technologies,* 475 U.S. 643, 649. Yet on the other hand, this Court has cautioned that the merits of the

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> is not to rule on the potential merits of the underlying claims.' *AT&T Technologies* . . . we conclude that while the trial court must not decide the merits of an alleged controversy when ruling upon a petition to compel arbitration, it must nevertheless determine the threshold question of whether the petition adequately alleges facts demonstrating the existence of an arbitrable controversy.

dispute are to be reserved exclusively for the arbitrator. *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960). Necessarily there are situations where some preliminary probing of the merits of a grievance is required to determine whether it is a matter intended by the parties for arbitration. It is the degree of judicial inquiry appropriate in such circumstances that needs definition.

The Third Circuit and the Eleventh Circuit have read *AT&T Technologies* as allowing, if not requiring, some review of the underlying substance of a grievance to determine whether it is a dispute arising under the contract. The Ninth Circuit has now limited this inquiry to the face of the grievance if the parties have agreed to arbitrate disputes arising under the contract. If a party alleges that the matter arises under the contract, the Ninth Circuit has deferred the validation of that claim to the arbitrator. Thus the arbitrator can define his or her own jurisdiction—a task which the Court has reserved for the judiciary. *AT&T Technologies,* 475 U.S. 643, 651. The Court's guidance is needed to clarify and refine the role of the Court in determining arbitrability.

The Ninth Circuit's decision in the instant case also blurs the distinction between a frivolous grievance on its merits and a frivolous claim of arbitrability. In *AT&T Technologies* the Court summarized its longstanding policy as follows:

> . . . [I]n deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether 'arguable' or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-

> bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. 'The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.' American Mfg. Co. 363 US, at 568, 4 L Ed 2d 1403, 80 S Ct 1343 (footnote omitted).

475 U.S. 643, 649-50.

The Ninth Circuit cites the above language to support its position that a court need not look beyond the wording of a grievance in determining arbitrability. The Ninth Circuit's analysis overlooks the issue of whether or not the instant dispute "arises under" the language of the collective bargaining agreement.

Granite Rock argues that a court must undertake a limited examination of the contract to determine if the union's grievance articulates a claim arising under the agreement. Then, and only then, will the court be able to state with certainty that the parties intended to submit the issue in dispute to arbitration.

If the answer to the inquiry is "yes," then the grievance must be arbitrated even if it is frivolous and totally without merit. For example, under a collective bargaining agreement with a standard arbitration clause and a provision dealing with overtime, a grievance claiming a right to triple-time pay for overtime work should be arbitrated even if the contract is silent on triple time. It is clear from the inclusion of an overtime clause that the

parties *intended* to arbitrate questions as to overtime regardless of how frivolous they appear to be.

The Ninth Circuit in this case has mandated the same treatment for a frivolous claim of arbitrability as described above for a grievance on the merits. In the Ninth Circuit's view, a frivolous jurisdictional claim must be deferred to arbitration if the grievance merely alleges that the dispute arises under the collective bargaining agreement and a standard arbitration clause is present.

Guidance is needed from the Court in delineating the standard to be applied by a court when faced with an unsupported assertion of arbitral jurisdiction. The answer of the Third and Eleventh Circuits to this question was a demand for evidence supporting the asserting parties' claim of contract coverage prior to ordering arbitration. The Ninth Circuit ruled that such inquiry is not required and is, indeed, prohibited where the party asserting the grievance makes a claim that the contract has been violated. Resolution of this conflict in Circuit decision is clearly necessary for future development of a uniform and cohesive federal labor policy.

## II. This Case Raises A Significant Question Of National Importance.

Not only does the instant dispute raise a conflict in the decisions of the United States Courts of Appeals, it also presents an issue of national importance requiring the guidance of the Supreme Court. The existence of a lower and easily circumvented threshold of arbitrability in the Ninth Circuit is expected to substantially broaden the class of disputes sent to arbitration in innumerable circumstances. Thereafter, the backlash at the bargaining

table promises to increase the difficulty of reaching agreements while diminishing the valuable role of arbitration.

The hallmark of collective bargaining in this country is the stability it has afforded the parties through the development of written collective bargaining agreements. This stability has been shaken by the Ninth Circuit's decision and the perception that fundamental rights may now be debated before an arbitrator when heretofore it was assumed that the parties had not voluntarily agreed to arbitrate such issues.[9] The facts of the instant case underscore the significance of such an expansion of arbitrable authority. Based solely on the Union's assertion that a promise not to double-breast is implicit in the contract, the Ninth Circuit ordered the parties to arbitrate that issue.

If the Ninth Circuit's standard of arbitrability is accepted, there will be nothing to preclude unions from asserting other equally unsupported "implied" covenants where the collective bargaining agreement fails to address its claims.

Thus, the Ninth Circuit's decision opens the door to arbitration of virtually any dispute, so long as the grievance is couched in language referencing the contract. The list of implied covenants that could be asserted is virtually endless: the covenant of good management, the covenant of maximum employment opportunities, and the covenant

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[9] When this Court granted certiorari in *AT&T Technologies*, it required a judicial determination of the arbitrability of certain layoffs. The national impact of allowing such an arbitration would have been neglible compared with the current issue of double-breasting.

of good faith and fair dealing in the employment relationship are examples. No management decision is beyond the reach of such covenants—be it the right of Granite Rock to guarantee a startup loan for an entirely legal and separate business, or an employer's right to select a new president whose management style is questioned. Did the parties seriously intend to arbitrate the *existence* of such covenants when they agreed to arbitrate disputes arising under a collective bargaining agreement? By failing to look behind the grievance to the actual language of the contract, the Ninth Circuit's standard allows the artfully pled grievance to be arbitrated regardless of whether it "arises under" the contract.[10]

Because the parties to a standard arbitration clause traditionally agree to arbitrate only those issues which "arise" under the agreement, the failure to make factual findings with respect to this issue precludes an employer from making a viable arbitrability argument. In sum, the standard enunciated by the court renders meaningless the

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[10] The ability to invoke arbitration by merely alleging the presence of an implied covenant has unanticipated consequences for unions as well as employers. It is well-established law that a labor dispute may be enjoined under a collective bargaining agreement only if the underlying dispute can be resolved through the grievance mechanism of the contract. *Boys Markets v. Retail Clerks Local 770,* 398 U.S. 235 (1970). If every contract allegedly has an implied covenant of no concerted activity *if* such activity would result in the loss of bargaining unit positions, then it is likely that any strike could be grieved on this theory during the term of a contract. This would enjoin the job action until the matter could be arbitrated, which could be at least several weeks. Clearly a union would argue for at least some evidence of an intention to arbitrate this issue beyond the mere allegation that the covenant can be decided under the terms of the collective bargaining agreement.

parties' agreement that only disputes arising under the contract will be sent to arbitration, in that it vests the grieving party with the unreviewable right to characterize the dispute as it chooses.

Once sent to arbitration, the ability of a party to successfully challenge or overturn the arbitrator's award is extremely limited. As stated by the Supreme Court in its recent decision in *United Paperworkers International Union v. Misco, Inc.*, — U.S. —, 98 L. Ed. 2d 286 (1987):

> ". . . [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."

98 L. Ed. 2d at 299.

The Ninth Circuit's holding in the instant case, coupled with the Supreme Court's decision in *Misco,* places an employer with a standard arbitration clause in a wholly untenable position. In the first instance the employer is denied review of the union's characterization of its grievance and is thus compelled to arbitration. Yet, once the arbitrator rules, the employer is again denied review of the arbitrator's decision absent the most extreme circumstances.

The *immediate* impact of the Ninth Circuit's ruling is to place into question the labor relations policies of countless West Coast employers who, heretofore, operated legally sanctioned double-breasted operations. Because the Union contends its implied covenant allegedly runs with all agreements, its establishment would prohibit the national practice of double-breasting. Rendered moot

would be the United States Supreme Court decision in *South Prairie Construction Co. v. Operating Engineers Local 627,* 425 U.S. 800 (1976), separating employers for labor relations purposes; unnecessary would be the NLRB's extensive efforts to define the limits of double-breasting; and wasted would be the recent work of Congress to regulate double-breasting (H.R. 281). Replacing Congress and the courts would be a system of arbitration not based on the specific language of the collective bargaining agreement but the arbitrator's personal belief as to whether an implied noncompetition covenant exists within bargaining agreements. Because the standard of review of arbitration decisions is so stringent, thousands of heretofore legally established double-breasted employers will be cast into a world of uncertainty. National choas in the administration of collective bargaining agreements can be expected to follow.

The end result of this situation is that parties signatory to collective bargaining agreements within the confines of the Ninth Circuit and those who are signatory to National Agreements encompassing employees within the jurisdiction of the Ninth Circuit will be hesitant to agree to standard arbitration clauses providing for resolution of all disputes "arising under" the contract. While such clauses clearly add to labor stability and assist the collective bargaining process, the risk of having such a provision in a contract will clearly outweigh its benefits. Proposed restrictive language at the bargaining table will inevitably increase the likelihood of labor disputes while reducing the favorable reputation which arbitration has enjoyed. The national policy favoring arbitration will be harmed, ironically, by a decision which in the first

instance forces unanticipated arbitrations. Such a result is antithetical to the federal policy favoring arbitration of labor disputes.[11]

## CONCLUSION

For the reasons stated, this Court should grant the Petition for Certiorari, summarily vacate the Ninth Circuit's decision and remand for judicial determination of whether the grievance at issue is arbitrable. Alternatively, the Court should grant the petition and give the case plenary consideration.

Dated: October 10, 1988

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation

By: Garry G. Mathiason,
Counsel of Record

By: Judy S. Coffin

By: Bruce J. Sarchet

*Attorneys for Petitioners*
*GRANITE ROCK COMPANY*

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[11] The profound national importance of the Ninth Circuit's decision is confirmed by the concern it has created among the leading national associations whose members are affected by this decision. *Amicus Curiae* briefs from the National Association of General Contractors and the National Association of Building Contractors are expected.

## APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| Building Materials and Construction Teamsters Local No. 216, | ) | |
| | ) | No. 87-1959 |
| Plaintiff-Appellee, | ) | |
| | ) | D.C. No. |
| v. | ) | CV-86-0378-RFP |
| | ) | |
| Granite Rock Company, a corporation, | ) | OPINION |
| | ) | |
| Defendant-Appellant. | ) | |

Appeal from the United States District Court
for the Northern District of California
Robert F. Peckham, District Judge, Presiding

Argued and Submitted
February 10, 1988—San Francisco, California

Filed July 11, 1988

Before: J. Clifford Wallace, Stephen Reinhardt and Edward Leavy, Circuit Judges.

Opinion by Judge Wallace

### SUMMARY

Labor/Arbitration

The court affirmed a summary judgment requiring the parties to arbitrate the question whether the employer violated an implied covenant in a collective bargaining agreement.

Appellee union represents ready-mix truck drivers in San Mateo county. Appellant Granite Rock Co. and the

union are parties to a collective bargaining agreement. Granite Rock's shareholders reactivated Central Supply Company. That in turn created a new ready-mix plant, Harbor Ready-Mix, in San Mateo County. The union grieved, asserting that Harbor and Granite Rock were alter egos and that Granite Rock had breached the agreement by operating Harbor without applying the economic and hiring provisions of the agreement to Harbor's employees and by refusing to recognize the union as the representative of Harbor's employees. Granite Rock did not process the grievance and instead sought a clarification from the NLRB to determine whether Harbor's employees were governed by the agreement. The union sued seeking to compel Granite Rock to comply with the grievance and arbitration provisions.

The NLRB rejected the union's alter ego claim and determined that the bargaining unit of ready-mix truck drivers at Granite Rock's San Jose plant did not include any of Harbor's employees. Granite Rock then moved for summary judgment arguing that arbitration of the union's grievance in light of the NLRB's decision was futile. The union conceded that the NLRB's decision foreclosed arbitration on the representational question. The union argued, however, that the NLRB's decision did not decide whether Granite Rock breached the agreement by establishing Harbor without applying the hiring and economic provisions of the agreement to Harbor's employees. The district court then ordered arbitration on this question. Granite Rock objected and the district court agreed with Granite Rock that a clause requiring an employer to apply the hiring provisions of its agreement to a newly established business would facially violate NLRA § 8(e). The district

court found, however, that a clause requiring an employer to apply the *economic* provisions of its agreement to a new business could be analogized to a union standards or work preservation clause and thus might survive a facial attack under section 8(e).

[1] Contrary to Granite Rock, the district court was not required to first determine whether the union's claim rested on a plausible reading of the agreement. Where the parties have agreed to arbitrate all contractual disputes, the court's function is strictly limited to determining whether the union's claim on its face is governed by the contract. [2] Granite Rock nevertheless contends that a party seeking to compel arbitration of a claim allegedly governed by an *implied* contractual provision must produce some evidence that provides a basis for implying the alleged covenant into the agreement. [3] The argument that a union's claim must be founded on an explicit provision in the agreement has been rejected.

[4] The district court correctly acknowledged that the NLRB's decision must take precedence over an inconsistent arbitration award, but found that the union's contractual claim involved issues distinct from the representational issues decided by the NLRB. [5] Granite Rock argues that the union's contractual claim is barred under res judicata. The representational question and contractual claim are distinct. [6] Granite Rock's collateral estoppel argument fails for similar reasons. [7] The union's allegations that Granite Rock reincorporated a then-defunct subsidiary in order to establish Harbor and that Harbor's existence is thus attributable to decisions and actions undertaken by Granite Rock's principals are con-

sistent both with the NLRB's finding and with the finding that Granite Rock pledged its credit in order to capitalize Harbor. Thus, an arbitrator could conclude that Granite Rock was responsible for establishing Harbor in violation of an alleged contractual provision prohibiting this conduct. [8] This court is not required to decide whether an implied contractual provision would violate federal labor law where, as here, the parties dispute both the existence and the scope of the implied provision.

## COUNSEL

Garry G. Mathiason, Littler, Mendelson, Fastiff & Tichy, San Francisco, California, for the defendant-appellant.

Duane B. Beeson, Beeson, Tayer, Silbert & Bodine, San Francisco, California, for the plaintiff-appellee.

## OPINION

WALLACE, Circuit Judge:

Granite Rock Company (Granite Rock) appeals the district court's order granting summary judgment in favor of Building Materials and Construction Teamsters Local No. 216 (union). The district court's order requires the parties to arbitrate the question whether Granite Rock violated an implied covenant in the multi-union, multi-employer bargaining agreement (agreement) to which it is a party. Granite Rock challenges the district court's determination of arbitrability on three grounds: (1) the union's grievance is not arbitrable because the union failed to demonstrate that its interpretation of the agreement was plausible, (2) the union's claim was decided adversely to the union in proceedings before the National Labor Re-

lations Board (Board) and is therefore barred by principles of res judicata and collateral estoppel; and (3) the implied covenant, if it exists, is unenforceable because it violates section 8(e) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(e), and public policy. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

## I

Granite Rock operates various businesses in Northern California, including a concrete manufacturing plant in San Jose, California. The union represents employees in the construction industry, including ready-mix truck drivers, in San Francisco and San Mateo counties. Both Granite Rock and the union are parties to the agreement between six locals, including the union, and the Aggregates and Concrete Association of Northern California, Inc., an employer association of which Granite Rock is a member. The agreement covers ready-mix truck drivers operating out of signatory concrete plants within the geographical jurisdictions of the locals.

In 1984, Granite Rock's shareholders decided to reactivate Central Supply Company (Central), an assetless subsidiary of Granite Rock. Granite Rock lent Central more than $300,000 by making its line of bank credit available to its subsidiary. Central then created a new concrete ready-mix plant in San Mateo County and began business operations in 1985 under the name of Harbor Ready-Mix (Harbor).

On August 5, 1985, the union filed a grievance against Granite Rock, asserting that Harbor and Granite Rock were "alter egos" and that Granite Rock had breached the

agreement by operating Harbor without applying the economic and hiring provisions of the agreement to Harbor's employees and by refusing to recognize the union as the representative of Harbor's employees. Granite Rock refused to process the grievance. Instead, it filed a unit clarification proceeding before the Board for the purpose of determining whether Harbor's employees were governed by the agreement.

In February 1986, the union brought this action in the United States District Court. In its complaint, the union sought to compel Granite Rock to comply with the grievance and arbitration provisions of the agreement with respect to its grievance concerning the establishment of Harbor. A few days after the complaint was filed, the Board's regional director held a hearing in the unit clarification proceeding initiated by Granite Rock. The regional director issued his decision on March 12, 1986, in which he rejected the union's alter ego claim and determined that the bargaining unit of ready-mix truck drivers at Granite Rock's San Jose plant did not include any of Harbor's employees. In reaching his decision, the regional director found that Harbor was not and never had been a signatory to the agreement, that Granite Rock and Harbor's business operations were dissimilar and that they neither shared nor exchanged personnel, and that Granite Rock did not play a consequential role in Harbor's business and personnel decisions. The union failed timely to appeal the regional director's decision and order, and the decision thereby became a final decision of the Board. NLRB Rules and Regulations § 102.67(b), (f), 29 C.F.R. § 102.67(b), (f) (1987).

Relying on the Board's order, Granite Rock moved for summary judgment in the union's action in the district court. Granite Rock argued that arbitration of the union's grievance would be futile because the Board's decision precluded the arbitrator from finding that the agreement applied to Harbor's employees. In response, the union filed a cross-motion for summary judgment, in which the union conceded that the Board's decision foreclosed arbitration on the representational question whether Harbor's employees were governed by the agreement. The union argued, however, that the Board's decision did not address or decide whether Granite Rock breached the agreement by establishing Harbor without applying the hiring and economic provisions of the agreement to Harbor's employees.

The district court granted the union's cross-motion for summary judgment. The court observed that while the Board's decision precluded arbitration of the representational issues decided by the Board, it did not bar arbitration of the remaining contractual issues raised by the union's complaint. Therefore, the court ordered arbitration of the question whether Granite Rock breached the agreement by establishing Harbor to compete with other employers without conforming to the hiring and economic provisions of the agreement.

Granite Rock moved under Fed. R. Civ. P. 59(e), to alter the district court's judgment. Granite Rock argued, among other things, that it was not required to arbitrate the union's grievance because any arbitration award favoring the union would necessarily conflict with NLRA § 8(e). On March 30, 1987, the district court granted in part and denied in part Granite Rock's motion to amend the judgment.

The district court agreed with Granite Rock that a clause requiring an employer to apply the hiring provisions of its agreement to a newly established business would facially violate NLRA § 8(e), which prohibits "work acquisition" agreements. The district court, however, found that a clause requiring an employer to apply the *economic* provisions of its agreement to a new business could be analogized to a "union standards" or "work preservation" clause, and thus might survive a facial attack under section 8(e). Consequently, the court modified its earlier decision by removing the issue involving the implied hiring provisions of the agreement from arbitration, and limited its order compelling arbitration to the following question: "Whether defendant has violated the collective bargaining agreement between the parties by establishing Harbor Ready Mix to compete with other employers covered by the agreement without conforming to the economic provisions of the agreement."

Granite Rock appeals the modified decision of the district court. The union has not appealed the district court's refusal to include the hiring provisions issue in the order compelling arbitration. We thus need decide only whether the district court erred in ordering the parties to arbitrate the question whether Granite Rock violated the agreement by establishing Harbor without ensuring that Harbor's employees would enjoy the economic benefits guaranteed to employees covered by the agreement. We review the district court's entry of summary judgment de novo. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986). We will uphold the summary judgment if it clearly appears that no genuine issue of material fact

remains for trial and that the union is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986).

II

Granite Rock argues that the district court erred in determining that the union's grievance is subject to the dispute resolution provisions of the agreement. The district court based its finding of arbitrability on section 18 of the parties' agreement, which provides that "[a]ll disputes arising under this agreement" shall be resolved in accordance with a procedure that requires, in order of priority, (a) discussions between the union and the employer, (b) referral to a Board of Adjustment, and (c) submission to an impartial arbitrator. The union alleged that Granite Rock violated an implied covenant in the agreement prohibiting Granite Rock from establishing a company that would compete with signatory employers without observing the economic provisions of the agreement. Granite Rock responded that the agreement could not reasonably be interpreted to include the implied covenant alleged by the union. Because the parties' dispute clearly involves the proper interpretation of the agreement, the district court correctly determined that the parties agreed to submit this dispute to arbitration. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986) (*AT&T*) (holding that there is a strong presumption of arbitrability where the labor contract purports to subject "any" or "all" grievances related to contract interpretation to arbitration); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 568-69 (1960) (*American Manufacturing*) (same).

[1] Granite Rock contends that by determining that the union's grievance was arbitrable without first determining that the alleged noncompetition clause could "plausibly" be implied into the agreement, the court erroneously relinquished the question of arbitrability to the arbitrator. It is, however, too late in the day for Granite Rock to argue that a court must first determine that there is some merit to the union's claims before ordering the parties to arbitrate their dispute. The district court was not required to determine whether the union's claim rested on a "plausible" reading of the agreement. By providing that "[a]ll disputes arising under this agreement" shall be resolved through arbitration, the parties agreed "to submit *all* grievances to arbitration, not merely those which the court will deem meritorious." *American Manufacturing*, 363 U.S. at 568 (emphasis added). Where, as here, the parties have agreed to arbitrate all contractual disputes, the court's function is strictly limited to determining whether the union's claim on its face is governed by the contract. *Id.* at 567-68. Hence, once the court determines that the parties' dispute concerns the proper interpretation of the agreement, it has "no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim." *Id.* at 568 (footnote omitted). This principle was recently reaffirmed in *AT&T*, where the Court explained:

> Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to

> order arbitration, but as the parties have agreed, by the arbitrator.

475 U.S. at 649-50.

[2] Granite Rock cannot, therefore, seriously dispute that a party who agrees to arbitrate any dispute governed by its collective bargaining agreement must do so even if the claim appears to be groundless. Nevertheless, it contends that a party seeking to compel arbitration of a claim allegedly governed by an *implied* contractual provision must produce some evidence that provides a basis for implying the alleged covenant into the agreement. Such evidence, Granite Rock suggests, would derive from some express provision of the agreement itself or from the parties' "past practice or bargaining history." According to Granite Rock, if employers can be required to arbitrate *any* dispute involving an implied covenant, without a showing that the covenant can reasonably be inferred from the provisions of the agreement, arbitrators will possess unlimited, unintended, and virtually unreviewable power to read a variety of implied covenants into every collective bargaining agreement. Looking to the circumstances of the instant case, Granite Rock argues that because the *only* evidence that the union presented in support of its alleged implied covenant was the agreement itself, and because the express provisions of the agreement provided absolutely no basis for implying such a covenant, the union's claim for arbitration must necessarily fail.

[3] As we have already pointed out, the argument that a union's claim must be grounded on an explicit provision in the agreement was rejected almost three decades

ago in *American Manufacturing*. There, the Supreme Court stated that where the parties have agreed to arbitrate all contractual disputes, a court has "no business . . . determining whether there is particular language in the written instrument which will support the claim." 363 U.S. at 568. This is not to say, however, that arbitration is required, as a matter of law, whenever a party asserts that another party breached its collective bargaining agreement. Nothing in our jurisprudence requires an employer who has not agreed to submit all contractual disputes to arbitration to submit any of its policies or decisions to the scrutiny of an arbitrator. The parties, not the courts, decide whether and to what extent their disputes will be subject to binding arbitration; it is the collective bargaining agreement that controls. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."). A party who explicitly agrees to submit "all disputes" concerning the interpretation of its collective bargaining agreement to an arbitrator may not be heard to complain that it did not intend this provision to be read literally.

III

[4] Granite Rock also argues that the union is precluded from relitigating its implied covenant theory under principles of collateral estoppel and res judicata. This argument is, in turn, premised on its assertion that the union's claim that Granite Rock violated the agreement by establishing another company (Harbor) is inconsistent

with the Board's determination that Granite Rock and Harbor "are not a single employer or alter egos of one another." The district court acknowledged that the Board's decision must take precedence over an inconsistent arbitration award, but found that the union's contractual claim involved issues distinct from the representational issues decided by the Board. We agree.

Res judicata bars subsequent litigation on a claim that was previously concluded by a judgment on the merits. *Parklane Hosiery Inc. v. Shore,* 439 U.S. 322, 326 n.5 (1979) (*Parklane Hosiery*). Collateral estoppel "precludes relitigation of issues actually litigated and necessary to the outcome of the first action." *Id.* These doctrines apply to administrative determinations, including those of the Board, when the agency's determinations have been made in a proceeding complying with standards of due process and when the findings are supported by substantial evidence in the administrative record. *Paramount Transport Systems v. Chauffeurs, Teamsters & Helpers, Local 150,* 436 F.2d 1064, 1065-66 (9th Cir. 1971). The Board's decision takes "precedence over" the arbitrator's decision. *Carpenters' Local Union No. 1478 v. Stevens,* 743 F.2d 1271, 1279 (9th Cir. 1984) (*Stevens*), *cert. denied,* 471 U.S. 1015 (1985). However, a Board decision takes precedence over an inconsistent arbitration award only when the dispute to be arbitrated involves representational issues. *Central Valley Typographical Union, No. 46 v. McClatchy Newspapers,* 762 F.2d 741, 747 (9th Cir. 1985). There is a "critical distinction" between representational issues and general contractual issues arising under collective bargaining agreements. *Id.*

Unless the union's contractual claim involves issues "inextricably bound up" with the representational issues decided by the Board, the Board's determination need not be accorded collateral estoppel effect. *See id.; see also Parklane Hosiery*, 439 U.S. at 326 n.5 (collateral estoppel precludes relitigation of issues "actually litigated" and "necessary to the outcome" of the first action).

[5] Granite Rock contends that the union's contractual claim is indistinguishable from the alter ego claim it litigated before the Board and is therefore barred under the doctrine of res judicata. The district court correctly rejected this argument. The representational question before the Board was whether the agreement should apply, as a matter of law, to Harbor's employees because Granite Rock and Harbor are a "single employer" or "alter egos" of one another. The union's contractual claim, in contrast, is based on the allegation that Granite Rock promised in the agreement to refrain from establishing a separate company unless the economic standards provided in the agreement were applied to the separate company's employees. These claims are clearly distinct; the first alleges a breach of an ongoing legal duty to apply the provisions of the agreement to Harbor's employees, while the second alleges a completed breach of a contractual duty to refrain from establishing a separate company. The district court thus correctly determined that the union's grievance was not barred by res judicata.

[6] Granite Rock's collateral estoppel argument fails for similar reasons. In deciding that Granite Rock and Harbor were not "alter egos" or a "single employer," the Board did not decide that Granite Rock owed no con-

tractual duty to refrain from establishing Harbor without ensuring that Harbor's employees enjoyed the economic benefits guaranteed to Granite Rock's employees under the agreement. Instead, it examined the operations of the two companies and determined that they were distinct enough to preclude a finding that Harbor's operations are presently controlled by Granite Rock. *See Radio and Television Broadcast Technicians Local 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (per curiam) (*Broadcast Service*) (under the single employer doctrine, Board inquires whether the two companies have interrelated operations, common management, centralized control of labor relations, and common ownership); *Stevens*, 743 F.2d at 1276-77 (under the alter ego doctrine, the Board examines factors similar to those implicated where employers are alleged to be a "single employer" to determine whether the bargaining unit of the signatory company is "effectively the same" as that of the second company). The Board's conclusion would not conflict with a finding that Granite Rock was initially responsible for putting Harbor into business, and that Granite Rock owed a contractual duty to refrain from this act unless it applied the economic standards provision of the agreement to Harbor's employees. The district court thus correctly determined that the Board's decision does not collaterally estop the union from seeking arbitration on its contractual claim.

[7] Granite Rock contends that even if the representational issues before the Board were distinct from the contractual issues underlying the union's grievance, the union is estopped from arguing that Granite Rock "established" Harbor because the Board determined that

Central, a subsidiary of Granite Rock, established Harbor. Granite Rock argues that a finding that Granite Rock established Harbor would conflict with this explicit finding. We disagree. The Board found that "Central Supply Company d/b/a Harbor Ready Mix . . . was established . . . by Central Supply Company's Board of Directors. . . ." The Board further found that "there has been common ownership of [Granite Rock] and Central Supply Company." The union claims that Granite Rock "reincorporated" a then-defunct subsidiary, Central, in order to establish Harbor. It alleges that Harbor's existence is thus attributable to the decisions and actions undertaken by Granite Rock's principals. The union's allegations are consistent both with the Board's finding that Habor was legally "established" by Central's Board of Directors and with the finding that Granite Rock pledged its credit in order to capitalize Harbor. We conclude, therefore, that an arbitrator could conclude that Granite Rock was responsible for "establishing" Harbor in violation of an alleged contractual provision prohibiting this conduct without having to make factual determinations inconsistent with the Board's findings.

Even if we were to read the Board's decision as suggesting that Granite Rock did not establish Harbor, collateral estoppel can be invoked only if an issue was necessary to the outcome of the prior action. *Parklane Hosiery*, 439 U.S. at 326 n.5. It was not necessary for the Board to decide if Granite Rock was responsible for "establsh-ing" Harbor. The Board's conclusion that, at the time the union's grievance was filed, the two companies were neither "alter egos" nor a "single employer" would not have required that it find that Granite Rock was not re-

sponsible for creating Harbor. Whether one company was responsible initially for creating another company is not one of the four factors that we consider in determining whether the two companies are presently "alter egos" or a "single company." *See Broadcast Service*, 380 U.S. at 256; *Stevens*, 743 F.2d at 1276-77. Thus, even if the Board had found that Granite Rock did establish Harbor, such a finding was not necessary to its determination of the ultimate legal question before it, thereby rendering collateral estoppel inappropriate.

IV

Granite Rock claims that the alleged implied covenant would violate either NLRA § 8(e) or public policy. In *United Food and Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1376-77 (9th Cir. 1984) (*Alpha Beta*), we recognized that a court could not compel arbitration if a contract clause on its face violated "all possible interpretations" of federal labor law or federal labor policy. The district court found that *Alpha Beta* did not bar arbitration on the grounds that an implied clause prohibiting an employer from establishing a separate business that does not observe the economic provisions of the collective bargaining agreement is similar to a "work preservation" or "union standards" clause, and thus facially valid under section 8(e) of the NLRA. *See NLRB v. Hotel & Restaurant Employees and Bartenders Union, Local 531*, 623 F.2d 61, 67 (9th Cir. 1980) ("work preservation or union standards clauses are not prohibited by section 8(e)").

[8] We need not reach the question whether the anti-double-breasting clause alleged to be present in this con-

tract would violate 8(e)'s prohibition against work acquisition in this case. We do not read *Alpha Beta* as requiring us to decide whether an implied contractual provision would violate federal labor law where, as here, the parties dispute both the existence and the scope of the implied provision. "[A] conflict between an arbitrator's decision and federal labor law 'is necessarily speculative when the arbitrator has yet to rule.'" *Alpha Beta*, 736 F.2d at 1376, *quoting Hospital & Institutional Workers Union, Local 250 v. Marshal Hale Memorial Hospital*, 647 F.2d 38, 42 (9th Cir. 1981). This is especially true where the parties cannot even agree that the clause, which is the subject of their dispute, exists as part of their agreement. Therefore, we are unable to determine at this stage of the litigation that "all possible interpretations" of the alleged clause facially violate federal labor law or public policy. *See Alpha Beta*, 736 F.2d at 1376-77. We decline to render an advisory opinion on the validity of the alleged noncompetition clause, and affirm the district court's order compelling arbitration of the union's grievance. We express no view on the merits of the union's grievance.

AFFIRMED.

## APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| BUILDING MATERIALS AND CONSTRUCTION TEAMSTERS LOCAL NO. 216, Plaintiff, | No. C-86-0378 RFP |
| v. | MEMORANDUM AND ORDER |
| GRANITE ROCK COMPANY, a corporation, Defendant. | |

### INTRODUCTION

Defendant Granite Rock Company ("Granite Rock") moves for an order altering the judgment of this court entered on August 29, 1986, in which we denied defendant's motion for summary judgment and granted Building Materials and Construction Teamsters Local No. 216's (the "union") cross-motion for summary judgment in an action to compel arbitration.

### BACKGROUND

A collective bargaining agreement exists between the union and Granite Rock. The agreement is a multi-union, multi-employer agreement in which the employees of the signatory employers constitute a single bargaining unit. The agreement runs through May 31, 1987.

The instant action is based upon a complaint to compel arbitration which was filed by the union on February 7,

1986. The union alleged in the complaint that, in July 1985, Granite Rock established a ready-mix concrete facility in Redwood City, California adjacent to its preexisting facility. This new facility was named Harbor Ready-Mix ("Harbor"), and is operated through Central Supply Corporation, a subsidiary of Granite Rock. The union alleged in its complaint that it had filed a grievance with Granite based on its belief that "Defendant and its subsidiary Harbor Ready-Mix have violated the agreement by refusing to apply the provisions of said agreement to the employees at the Harbor Ready-Mix facility." Plaintiff's Complaint to Compel Arbitration, at ¶ 7. Because Granite Rock had allegedly refused to accept the grievance or participate in the grievance procedure of the agreement, the union sought an injunction that would compel Granite Rock to comply with the provisions of section 18 of the agreement setting forth the procedures for resolving disputes, including arbitration.

While the complaint was pending, the Regional Director for Region 32 of the National Labor Relations Board ("NLRB" or "Board") issued a decision and order in a "unit clarification" proceeding filed by Granite Rock. The Regional Director found that Granite Rock and Harbor "are not a single employer or alter egos of one another," and therefore ordered that "the collective-bargaining unit set forth in the employer-petitioner's current collective-bargaining agreement with the Union be, and it hereby is, clarified to exclude from it all employees employed by Harbor Ready Mix." Decision and Order, Granite Rock Company and Construction and Building Material Teamsters, Local No. 216, Case 32-UC-169, reprinted at Decl. of Bruce Sarchet, May 20, 1986, Exh. A.

Based on the findings of the Board, Granite Rock filed a motion to dismiss and for summary judgment with respect to the union's complaint to compel arbitration. Granite Rock contended in its motion that the union's request to compel arbitration was inconsistent with the decision of the NLRB. In response to Granite Rock's motion for summary judgment, the union filed a cross-motion for summary judgment. In light of the Board's decision, the union no longer sought to compel arbitration to determine whether the agreement should be applied to Harbor's employees, but instead sought to compel arbitration to determine whether Granite Rock had violated the agreement by establishing Harbor without requiring Harbor to conform to the hiring and economic provisions of the agreement.

In an order dated August 29, 1986, this court granted the union's cross-motion for summary judgment. While we recognized that the Board's decision would take precedence over an inconsistent arbitration award that involved representational issues, we found that the relief sought by the union was based upon contractual rather than representational grounds. We therefore ordered defendant to participate in an arbitration hearing addressing the following issue:

> Whether Defendant has violated the collective bargaining agreement between the parties by establishing Harbor Ready Mix to compete with other employers covered by the agreement without conforming to the hiring and economic provisions of the agreement.

Order at 11.

On September 15, 1986, Granite Rock filed its motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to alter the judgment entered against it. Granite Rock bases its motion on the following grounds: (1) the court erred in its application of *Local Joint Executive Board of Las Vegas v. Royal Center, Inc.*, 796 F.2d 1159 (9th Cir. 1986); (2) the implied contract term pursuant to which arbitration is sought violates section 8(e) of the National Labor Relations Act ("NLRA"), and would also violate sections 8(b)(1)(A) and (b)(2) if enforced and (3) the implied contract term violates public policy.

## DISCUSSION

### 1. *The Collateral Estoppel Effect of the NLRB's Alter Ego Determination*

Granite Rock argues that this court erroneously relied on the Ninth Circuit's decision in *Royal Center* in concluding that the NLRB's decision should not be given collateral estoppel effect. In our August 29, 1986 order, we interpreted *Royal Center* as holding that, although an arbitrator is prohibited from making an award that is inconsistent with an NLRB determination that one company is not an alter ego of another, a court cannot give collateral estoppel effect to such a decision in cases involving issues of fact or contract interpretation. Granite Rock reads *Royal Center* as being limited to the proposition that the Board's refusal to issue a complaint in cases involving issues of fact or contract interpretation does not collaterally estop a party from seeking arbitration on those same issues. *Royal Center* is not applicable to the instant dispute, Granite Rock contends, because here the Board

did not simply refuse to issue a complaint, but conducted a full evidentiary hearing.

After a further reading of *Royal Center,* we agree with Granite Rock that the *Royal Center* holding is not dispositive in a dispute such as the instant one where the Board has conducted a full evidentiary hearing. However, we do not agree with Granite Rock that this more narrow reading of Royal Center requires us to alter our previous judgment.

Where the NLRB has resolved material factual issues after a full evidentiary hearing, the NLRB decision constitutes collateral estoppel to later litigation only of those same issues. *See Paramount Transportation Systems v. Chauffeurs, Teamsters & Helpers Local 150,* 436 F.2d 1064, 1066 (9th Cir. 1971); *Glaziers & Glassworkers Local Union #767 v. Custom Auto Glass Distributors,* 689 F.2d 1339, 1341 (9th Cir. 1982). Furthermore, because the Board's primary jurisdiction extends only to cases involving representational issues, *see Carey v. Westinghouse Electric Corp.,* 375 U.S. 261, 272 (1964), "the Board's final decision takes precedence over an inconsistent arbitration award only when the dispute involves representational issues." *Central Valley Typographical Union No. 46 v. McClatchy Newspapers,* 762 F.2d 741, 747 (9th Cir. 1985). Unless "the contract interpretation issue [is] inextricably bound up with the representational issue," a Board decision on a representational issue will not have collateral estoppel effect on a later contractual issue. *See id.*

As we discussed at length in our August 29 order, the Board's decision involved a representational issue

(determining the scope of the agreement's collective bargaining agreement), whereas the issue we have ordered to be resolved in arbitration is a contractual one: whether Granite Rock breached an implied contract term in the collective bargaining agreement by establishing Harbor without requiring Harbor to adopt the hiring and economic provisions of the agreement. A resolution of this contractual issue does not involve the same factual determinations as those made by the Board in its decision on the representational issue. In determining that Granite Rock and Harbor were not "alter egos" of each other, the Board relied on the fact that Granite Rock services large commercial customers while Harbor services residential customers, that their employees perform distinctive functions, and that they are not supervised by the same individuals. *See* Decl. of Bruce Sarchet, May 20, 1986, Exh. A at 3-4. The Board never decided that Granite Rock did not establish Harbor, and in fact found that Granite Rock pledged its credit in order to capitalize Harbor, and that Granite Rock and Harbor have common ownership. *See id.* at 2-3. It is entirely possible that a company could "establish" an entity that is not its "alter ego," and an arbitrator could therefore conclude that Granite Rock "established" Harbor in violation of an implied contractual term without having to make any factual determinations inconsistent with the Board's findings.

Thus, because the Board's hearing on the "alter ego" question involved a different issue from the one we have ordered to be resolved in arbitration, and because the representational and contractual issues involve distinct factual determinations and therefore cannot be said to be "inextricably bound up" with each other, we conclude

that the Board's decision does not collaterally estop the union from seeking arbitration on the contractual issue.

2. *The Validity of the Implied Contract*

Granite Rock also urges the court to alter its previous judgment on the ground that the alleged implied contract term in the collective bargaining agreement violates, on its face, section 8(e) of the Act, and in its application would violate sections 8(a) and 8(b) of the Act.[1] For the reasons set forth below, we agree with Granite Rock that the hiring provisions of the implied contract would violate section 8(e), and we therefore grant Granite Rock's motion to alter the judgment. However, we find that the economic provisions of the implied contract would not necessarily violate the Act, and that arbitration of the economic provisions is therefore appropriate.

Section 8(e) of the Act provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person.

While section 8(e) on its fact forbids *all* agreements that prevent an employer from doing business with another employer, the NLRB has recognized an exception for

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[1]While these issues were not raised by Granite Rock in its original motion for summary judgment, they were raised at oral argument on the cross-motions for summary judgment on July 21, 1986, and they may properly be considered for this motion to alter the judgment.

clauses which limit business dealings in order to "preserve for bargaining unit employees work that has traditionally been performed by them, the so-called work-preservation clause, or . . . [to] maintain the same standards of employment, the so-called union standards clause . . . ." *Retail Clerks Union Local 1442,* 271 N.L.R.B. 697, 697 (1984). The rationale behind this exception is that a union has a valid interest in preserving unit work and ensuring that negotiated standards will not be undermined. *See id.* However, where a contract clause runs to non-economic terms that require an employer to adhere to working conditions unrelated to economic benefits, the clause violates section 8(e). *See id.* Such clauses violate the Act because they are not designed to protect the wages and job opportunities of unit employees, but rather are designed to further general union objectives and regulate the labor practices of other employers.

The union insists that the alleged implied contract term prohibiting Granite Rock from establishing an entity to compete with other signatory employers if that entity does not comply with the economic and hiring provisions of the agreement falls within the classic definition of a "work preservation" clause. By preventing a business paying substandard wages under substandard working conditions from competing in the same market with businesses that employ the union's members, the union argues, the implied clause legitimately protects the wages and conditions of its members, and does not have a prohibited secondary objective of furthering general union goals.

We agree with the union in this case that the economic provision of the alleged implied contract is not facially invalid under section 8(e) because it may constitute a

valid work preservation clause. "Work preservation clauses, also known as union standards clauses, prohibit an employer from subcontracting work normally performed by union employees to any employer who pays his employees less than union wages." *N.L.R.B. v. Hotel & Restaurant Employees and Bartenders,* 623 F.2d 61, 67 (9th Cir. 1980). Union standards clauses "are generally characterized by the fact that they define the group of permissible subcontractors in terms of economic standards rather than terms of union affiliation." *Id.* Although this case does not involve subcontracting, the same general principles should apply where an employer agrees not to establish another entity unless it conforms to the economic provisions of a collective bargaining agreement. The purpose of such an agreement is identical to that of an anti-subcontracting agreement: to prevent the primary employer from diverting work to a lower paid work force that is not within the collective bargaining agreement. "Because the pressure produced by such clauses is focused upon the primary employer with whom the union is concerned . . ., the pressure is primary and protected." *Id.* Thus, we find that the economic provision of the implied contract is not facially invalid under section 8(e).[2]

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[2]As the defendant here points out, the Board found in its unit clarification hearing that the "nature and purpose of the respective business operations" were "unalike." Decl. of Bruce J. Sarchet, Exh. A at 3. However, the Board simply had no occasion to consider whether the business operations were so "unalike" that enforcement of the economic provisions of the collective bargaining agreement might constitute unlawful secondary pressure rather than work preservation. On this record, we can only conclude that the economic provision of the implied contract does not violate section 8(e) on its face. We leave it to the arbitrator to determine whether the economic provision violates section 8(e) as applied.

However, this reasoning does not extend to the requirement that entities established by Granite Rock conform to the hiring provisions of the collective bargaining agreement. These provisions require that hiring must be done through the union hiring hall, and that the employer can only retain in employment "members in good standing in the Union." Plaintiff's Complaint to Compel Arbitration, Exh. A at 3. The implied clause in the instant case is similar to the clause held violative of section 8(e) in *NLRB v. Hotel & Restaurant Employees and Bartenders,* 623 F.2d 61 (9th Cir. 1980). There, the clause required a non-signatory employer (a subcontractor) to abide by "all provisions of the collective bargaining agreement," including union hiring provisions. *See id.* at 67. In finding that the clause was not a work preservation clause, the court stated:

> Union affiliation or approval bears no absolute relationship to the economic condition of the subcontractor, and clauses requiring such affiliation or approval are directed at more than work preservation—they are generally viewed as an effort to expand the Union's sphere of influence by impermissible secondary pressure.

*Id.* Because the tactical objective of the clause was the unionization of the non-signatory employer, the clause was held to be violative of section 8(e). That some benefit may have flowed to the union employees was held not sufficient to alter the basic secondary nature of the provision. *See id.* at 68. Thus, for the reasons stated by the Ninth Circuit, we find the hiring provisions of the alleged implied contract in this case to be violative of section 8(e).

It is well established in this circuit that "a court cannot compel arbitration if a contract clause on its face vio-

lates federal labor law or is contrary to federal labor policy." *United Food and Commercial Workers v. Alpha Beta Co.*, 736 F.2d 1371, 1376 (9th Cir. 1984). While the mere possibility of conflict between the arbitrator's decision and federal labor law should not preclude arbitration, if "all possible interpretations" of a contract provision would result in a conflict with federal labor law, arbitration is precluded. *See id.* In this case, we have found that the economic provisions of the implied contract are not facially invalid under section 8(e), and we will therefore require arbitration of that issue. However, the hiring provisions of the implied contract are facially invalid under section 8(e), and we will therefore alter our previous judgment by removing the hiring issue from arbitration.[3]

## CONCLUSION

The court grants the defendant's motion in part and denies it in part. The previous judgment entered by the court is hereby altered to remove from arbitration the issue of noncompliance with the hiring provisions of the collective bargaining agreement. The defendant is hereby ordered to participate in an arbitration proceeding pursuant to section 18 of the collective bargaining agreement between the parties with respect to the following issue:

> Whether defendant has violated the collective bargaining agreement between the parties by establishing Harbor Ready Mix to compete with other employers

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[3]The defendant's arguments based on sections 8(a)(1) and (b)(2) of the NLRA are relevant only to the hiring provisions of the implied contract. Because we find the hiring provisions to be violative of section 8(e), we need not address these contentions. Furthermore, as confined to the economic provisions of the implied contract, we find that the contract is not violative of public policy.

covered by the agreement without conforming to the economic provisions of the agreement.

IT IS SO ORDERED.

Dated: March 30, 1987

/s/ Robert F. Peckham
Chief United States District Judge

C-86-0378 RFP BUILDING MATERIAL AND CONSTRUCTION TEAMSTERS LOCAL NO 216 vs. GRANITE ROCK COMPANY

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned deputy clerk, declare under penalty of perjury that I served the following document(s) as listed below by enclosing a true copy of said document(s) in a separate postage paid, sealed envelope and to-day placing the said envelope in a regularly maintained United States Postal Service mail depository in the City and County of San Francisco, California, addressed as follows:

Duane B. Beeson, Esq.,
BEESON, TAYER & SILBERT
100 Bush St., Suite 1500
San Francisco, CA 94104

Garry G. Mathiason, Esq.,
Bruce J. Sarchet, Esq.,
LITTLER, MENDELSON, FASTIFF & TICHY
650 California St., 20th Floor
San Francisco, CA 94108-2693

1) MEMORANDUM AND ORDER RE MOTION BY DEFENDANT GRANITE ROCK FOR ORDER ALTERING JUDGMENT ENTERED ON AUGUST 29, 1986

DATED: March 30, 1987

/s/ Raymond Xavier
Deputy Clerk

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| BUILDING MATERIALS AND CONSTRUCTION TEAMSTERS LOCAL 216, | ) | |
| | ) | No. C-86-0378 RFP |
| Plaintiff, | ) | |
| | ) | ORDER |
| v. | ) | GRANTING |
| | ) | SUMMARY |
| GRANITE ROCK COMPANY, | ) | JUDGMENT |
| | ) | |
| Defendant. | ) | |

### INTRODUCTION

This action involves an attempt by plaintiff union, Building Materials and Construction Teamsters Local 216, to compel arbitration. Defendant Granite Rock Company has moved to dismiss the complaint or, alternatively, for summary judgment. Plaintiff, in response, also moves for summary judgment.

### FACTS

A collective-bargaining agreement exists between plaintiff union, Building Materials and Construction Teamsters Local No. 216 ("Local 216" or "the union"), and defendant Granite Rock Company ("Granite"). The agreement has a term from June 1, 1984, through May 31, 1987.

The collective-bargaining agreement is a multi-union, multi-employer agreement. The employees of the employers who are signatories to the agreement constitute

a single bargaining unit. The employer association responsible for negotiating the collective-bargaining agreement is known as Aggregates and Concrete Association of Northern California, Inc. (ACA).

Plaintiff alleges that in July 1985, defendant established a ready-mix concrete facility in Redwood City, California, adjacent to its pre-existing facility. This new facility was named Harbor Ready Mix, and is operated through a subsidiary corporation of defendant.

In a letter dated July 22, 1985, Local 216 wrote to Granite to assert that Harbor Ready Mix is bound by the ACA agreement to which Granite is a signatory. The union alleged that Harbor Ready Mix is the "alter ego" of Granite. Letter from Dallas Allen to Betsy Wolpert [sic], July 22, 1985, Complaint to Compel Arbitration, Exh. B.

On August 7, 1985, Granite responded to this letter by advising Local 216 that, in its view, the ACA agreement does not extend to Harbor Ready Mix: "Your request concerns employees who are not employees of Granite Rock Company and are outside the scope of the unit described in the A.C.A. agreement. No one connected with Granite Rock Company has any control or influence regarding day-to-day management, labor negotiations or day-to-day operations of Harbor Ready Mix." Letter from Betsy Woolpart to Dallas Allen, August 7, 1985, Complaint to Compel Arbitration, Exh. C.

Plaintiff submitted a grievance under section 18 of the collective-bargaining agreement, alleging a violation of the agreement by virtue of defendant's and its subsidiary's refusal to apply the agreement to employees of

Harbor Ready Mix. Defendant refused to accept the grievance and to participate in the grievance process, according to plaintiff's complaint.

On February 7, 1986, plaintiff union filed this action to compel arbitration, basing federal jurisdiction on § 301 of the National Labor Relations Act, 29 U.S.C. § 185. Plaintiff alleges that following the beginning of Harbor Ready Mix's operations in July 1985, at no time has this company complied with the provisions of the collective-bargaining agreement; rather, "Defendant has at all times refused to recognize Plaintiff as the representative of any of the employees at its Harbor Ready-mix facility in Redwood City." Complaint to Compel Arbitration, at ¶ 7. Plaintiff's complaint seeks an injunction that would compel defendant to comply with the provisions of section 18 of the collective-bargaining agreement, including arbitration, with regard to plaintiff's grievance.

Prior to the filing of the union's complaint, defendant filed a "unit clarification" proceeding with the National Labor Relations Board (NLRB). The Regional Director held a hearing, and on March 12, 1986, issued a decision and order finding that defendant and Harbor Ready Mix "are not a single employer or alter egos of one another. . . . As such, the Employer-Petitioner's [Granite Rock Company's] contractual unit will be clarified to exclude from it all employees of Harbor Ready Mix." Decision and Order, Granite Rock Company and Construction and Building Material Teamsters, Local No. 216, Case 32-UC-169, reprinted at Decl. of Bruce Sarchet, May 20, 1986, Exh. A. The Regional Director's order was as follows: "It is hereby ordered that the collective-bargaining unit

set forth in the employer-petitioner's current collective-bargaining agreement with the Union be, and it hereby is, clarified to exclude from it all employees employed by Harbor Ready Mix." *Id.* at 5.

On May 7, 1986, the NLRB notified the parties that the union's request for review of the Regional Director's decision was rejected as untimely. *See* Decl. of Sarchet, May 20, 1986, Exh. B.

## DISCUSSION

Neither party disputes that the NLRB properly exercises authority to determine the scope of a bargaining unit under § 9(b) of the National Labor Relations Act, 29 U.S.C. § 159(b). The findings of the Board are given considerable deference by courts and are subject to review under an "arbitrary and capricious" standard. *Tanforan Park Food Purveyors Council v. NLRB*, 656 F.2d 1358, 1360 (9th Cir. 1981). The plaintiff union does not, for purposes of this motion, dispute the finding of the NLRB that employees of Harbor Ready Mix are not in the same collective-bargaining unit as union employees of Granite.

### A. *Potential Conflict Between the NLRB Decision and Arbitration Decision*

Defendant maintains that this finding of the NLRB effectively bars any relief that could be provided to the union by way of arbitration since the NLRB's decision, not the arbitrator's, is final on the issue of determination of bargaining units. *Carey v. Westinghouse Electric Corporation*, 375 U.S. 261, 272 (1964).

The question of whether an arbitration of the union's grievance in this case could provide it with appropriate

relief is seemingly answered by the Ninth Circuit's decision in *Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 2018 (1985). The Circuit held that where the decisions of the Board and an arbitrator conflict on a representational issue, the Board's decision must take precedence. The court specifically found that the Board's determination under NLRA § 9(b) that the employees of two companies were not part of the same bargaining unit (because, *inter alia*, the two companies were not alter egos) meant that an arbitration decision to the contrary could not be upheld. *Id.* at 1279. Granite argues, therefore, that any decision by the arbitrator contrary to the NLRB's decision regarding the bargaining unit would have no effect. According to defendant, plaintiff's petition to compel arbitration should be dismissed since the arbitrator would be powerless to change the ruling of the Board and arbitration would be futile. *See also Cannery Warehousemen, Food Processors, Drivers and Helpers for Teamsters Local # 748 v. Haig Berberian, Inc.*, 623 F.2d 77, 81 (9th Cir. 1980) (Board decisions occupy a preeminent position vis-a-vis arbitrator decisions under the supremacy doctrine).

Nevertheless, plaintiff contends that the Board's decision does not foreclose arbitration. The union cites *Gateway Structures, Inc. v. Carpenters 46 Northern California Counties Conference*, 779 F.2d 485 (9th Cir. 1985), for the proposition that *Carpenters' Local Union* should be read narrowly to allow arbitrators to make bargaining unit determinations, so long as such decisions are based on contract principles and not the NLRA. In *Gateway Structures*, this court enforced an arbitration award in

favor of the union which determined that a nonsignatory employer was bound by the terms of a collective-bargaining agreement due to a determination that the signatory and nonsignatory employers had operated their companies as essentially one business. The arbitrator's decision in *Gateway Structures,* however, occurred in the absence of any Board decision on unit-representation. The court noted that it would be improper to allow the "speculative possibility" of a subsequent NLRB decision adverse to the decision of the arbitrator be sufficient to prevent enforcement of the arbitrator's award. *Id.* at 490. Thus, this case does not support the union's contention that arbitration should take place in the context of this case where the Board has already rendered a decision regarding union representation that may well conflict with an arbitrator's decision.

The union is nevertheless correct in arguing that arbitration on certain issues can proceed in the face of an existing NLRB decision. Although the Board and arbitrators have concurrent jurisdiction over both representational issues and general contractual issues arising out of a collective-bargaining agreement, the Board's decision only takes precedence over an inconsistent arbitration award that involves representational issues. *Central Valley Typographical Union, No. 46 v. McClatchy Newspapers,* 762 F.2d 741, 747 (9th Cir. 1985).

Defendant argues, in essence, that the relief sought by the union through arbitration in this case is necessarily representational, and thus barred by the NLRB decision: "The only possible remedy which Plaintiff seeks in this lawsuit is a change in the working conditions of Harbor

employees." Defendant's Opp. to Plaintiff's Motion for Summary Judgment, July 14, 1986, at 3.

Defendant is incorrect. The union's argument in its brief hints at an alternative avenue of relief that is based on contractual rather than representational grounds. Plaintiff states, for example, that, "The Regional Director's decision, however, does not encroach upon the contention, which is encompassed within Plaintiff's grievance, that the collective-bargaining agreement forbids Defendant from establishing a new and separate entity to which it does not apply the hiring and economic provisions of the agreement." Plaintiff's Memo. on Cross Motions, July 7, 1986, at 7. The union thus seeks arbitration based on the terms of the collective-bargaining agreement that considers the question of whether Granite, as a signatory employer, has made either an express or implied promise to the union to recruit employees for any newly-established business from the union's hiring hall under section 3 of the agreement. At the hearing on this motion, the union was even more explicit about the type of relief sought by arbitration: namely, monetary damages for the alleged violation of the contractual provision that "implicitly" prohibited the defendant from setting up a so-called "double-breasted" entity. *See generally Carpenters' Local Union No. 1478,* 743 F.2d at 1275 ("double-breasted" operations typically arise where contractor operates one company that is party to a labor agreement and a second company that is non-union). These damages would be based on the putative loss of union jobs by the creation of a non-union operation.

The Ninth Circuit's recent decision in *Local Joint Executive Board of Las Vegas v. Royal Center, Inc.*, No.

84-1867 (9th Cir. Aug. 12, 1986), *on remand from,* 106 S.Ct. 1627 (1986), *vacating and remanding,* 754 F.2d 835 (9th Cir. 1985), lends substantial support to the union's contention that arbitration should not be barred by the existence of the NLRB decision. In *Royal Center,* the Ninth Circuit found that although an arbitrator is prohibited from making an award that is inconsistent with an NLRB determination that one company was not the alter ego of another, the court cannot give collateral estoppel effect to such a decision in cases involving issues of fact or contract interpretation. *Id.* (citing *Edna H. Pagel, Inc. v. Teamsters Local Union 595,* 667 F.2d 1275, 1280 (9th Cir. 1982)). *See also Hospital and Institutional Workers Union Local 250 v. Marshal Hale Memorial Hospital,* 647 F.2d 38, 42 (1981) (in petition to compel arbitration, mere possibility of conflict between the arbitrator and the NLRB should not be barrier to arbitration).

The Circuit's holding in *Royal Center* is consistent with the union's contention in this case that arbitration should proceed, despite the NLRB's determination that Harbor Ready Mix is not the alter ego of Granite and that the employees of the two companies are not in the same bargaining unit. The union offers an alternative theory that would provide for arbitral relief for the union based upon interpretation of the collective-bargaining agreement. This decision need not depend upon a finding inconsistent with the representational decision of the Regional Director.

B. *Arbitrability of the Dispute*

The strong presumption in favor of arbitration counsels in favor of a judgment by this court that the parties

pursue the union's grievance in that forum. *See Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionary Workers Union,* 430 U.S. 243, 254-55 (1977) (federal labor policy favors arbitration as the means of resolving disputes over the meaning and effect of collective-bargaining agreements).

For the court to compel arbitration of the union's grievance, it must examine the scope of the arbitration clause to determine if it is sufficiently broad to encompass the type of dispute raised by the union. *See AT&T Technologies, Inc. v. Communications Workers of America,* 106 S.Ct. 1415, 1418 (1986) (" . . . the question of arbitrability — whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination."). In this case, such a determination is easily made. Section 18 of the collective-bargaining agreement specifies that "all disputes" are to be resolved in accordance with a procedure that requires (a) discussions between the union and the employer; (b) referral to the Board of Adjustment; and (c) submission to an impartial arbitrator. Section 18, "Grievance Procedure," 1984-1987 Agreement between Aggregates and Concrete Association of Northern California, Inc. and International Brotherhood of Teamsters, Chauffeurs, and Warehousemen of America Locals 78, 216, 287, 291, 315, 853, reprinted at Complaint to Compel Arbitration, Exh. A. Given the union's contention that its grievance can be settled by reference to its collective-bargaining agreement with the defendant, it is clear that this grievance constitutes the type of "dispute" which, under the parties' own contract, they have determined should be resolved by means of arbitration. *See,*

*e.g., Gateway Structures,* 779 F.2d at 488 (finding union grievance arbitrable where collective-bargaining agreement provided for arbitration of "any dispute" concerning the relationship of the parties and any application or interpretation of the agreement). The court's finding that arbitration is appropriate in this case is further supported by the presumption in favor of construing arbitration clauses to cover employer-union disputes. *AT&T Technologies,* 106 S.Ct. at 1419.

Finally, it is important to note that the court's decision directing the defendant to submit to arbitration of the union grievance does not entail an endorsement of the union's theory of why relief is appropriate under the collection-bargaining agreement. Likewise, the court does not pass upon defendant's argument that plaintiff's theory is invalid.

> The third principle derived from our cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator.

*Id.* at 1419.

## CONCLUSION

Accordingly, the court grants summary judgment in favor of plaintiff Local 216. Defendant is hereby ordered to participate in an arbitration proceeding pursuant to section 18 of the collective-bargaining agreement between

the parties with respect to the following issue tendered by the union:

> Whether defendant has violated the collective-bargaining agreement between the parties by establishing Harbor Ready Mix to compete with other employers covered by the agreement without conforming to the hiring and economic provisions of the agreement.

IT IS SO ORDERED.

Dated: August 28, 1986.

/s/ Robert F. Peckham
Chief United States District Judge

C-86-0378 RFP BUILDING MATERIALS AND CONSTRUCTION TEAMSTERS LOCAL NO. 216 vs. GRANITE ROCK COMPANY

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned deputy clerk, declare under penalty of perjury that I served the following document(s) as listed below by enclosing a true copy of said document(s) in a separate postage paid, sealed envelope and to-day placing the said envelope in a regularly maintained United States Postal Service mail depository in the City and County of San Francisco, California, addressed as follows:

Duane B. Beeson, Esq.,
BEESON, TAYER & SILBERT
100 Bush St., Suite 1500
San Francisco, CA 94104

Bruce J. Sarchet, Esq.,
LITTLER, MENDELSON, FASTIFF
AND TICHY
650 California St., 20th Floor
San Francisco, CA 94108-2693

1) ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

2) JUDGMENT

DATED: August 29, 1986

/s/ Raymond Xavier
Deputy Clerk

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## APPENDIX D

(San Jose, California)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
REGION 32

GRANITE ROCK COMPANY,

Employer-Petitioner

and

Case 32-UC-169

CONSTRUCTION AND BUILDING
MATERIAL TEAMSTERS, LOCAL
NO. 216, a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA

Union[1]

DECISION AND ORDER

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provision of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

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[1] The name of the Union appears as amended at the hearing.

2. The Employer-Petitioner is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act and represents certain employees of Employer-Petitioner.

4, For the reasons set forth below, and in accordance with the proposed unit clarification requested by Employer-Petitioner, the collective bargaining unit set forth in the Employer-Petitioner's current collective bargaining agreement with the Union will be clarified to exclude from it all employees of Central Supply Corporation d/b/a Harbor Ready Mix.

The Employer-Petitioner is a California corporation engaged in the manufacture and sale of concrete products with a principal office in Watsonville, California and satellite ready-mix plants in Sand City, Salinas, Gilroy, Hollister, Watsonville, Santa Cruz and San Jose, California. The record establishes that the Employer-Petitioner's San Jose ready-mix operation is represented for purposes of collective bargaining by Aggregates and Concrete Association of Northern California, Inc., herein called ACA, a multi-employer association. The Employer-Petitioner's San Jose, California ready-mix drivers are represented by the Union under the collective bargaining agreement between the Union and ACA effective by its terms from June 1, 1984 through May 31, 1987. By filing a grievance, the Union sought to include all employees of Harbor Ready Mix in the bargaining unit which includes Granite Rock's San Jose truckdrivers.

In 1973, Central Supply Company merged into the Employer-Petitioner. Central Supply was then subsequently reincorporated. Since the merger and "reincorporation" there has been common ownership of Employer-Petitioner and Central Supply Company, although each remains separately incorporated. Up to no later than 1977, Supply Company operated a truck repair business in Gilroy, and then engaged in no active business. Central Supply Company d/b/a Harbor Ready Mix, herein called Harbor Ready Mix, was established in early 1985 with an office in Redwood City, California, by Central Supply Company's Board of Directors to appeal to the homeowner and other smaller customers in San Mateo County in need of concrete supplies and services. The record reveals that Harbor Ready Mix is not now and has never been either a member of ACA or a signatory to any collective bargaining agreement with the Union.

The record establishes that the Employer-Petitioner pledged its credit in order to capitalize Harbor Ready Mix and that Harbor Ready Mix is obligated to repay Employer-Petitioner principal and interest payments in those amounts and in the time period specified in the loan note between Employer-Petitioner and the lender. Central Supply Corporation hired Bobby Lee Mann in March 1985 as the General Manager of Harbor Ready Mix and he, in turn, was solely responsible for securing applicable building permits, selecting equipment, including batch plant and mixers, and entering into equipment leases. Mann was responsible for the hiring, supervision and discipline of all personnel, the development and implementation of all terms and conditions of employment, including wages,

work schedules, vacation and insurance benefits, and payroll services, the selection of raw materials and the suppliers of the same, the pricing of goods and services, the selection of advertising and accounting services, and the establishment of a phone number, post office box and bank accounts. None of Mann's decisions with respect to the foregoing matters were subject to the review or approval by Central Supply Company or Employer-Petitioner.

The record further establishes that the nature and purpose of the respective business operations of the Employer-Petitioner and Harbor Ready Mix are unalike. In this regard, the Employer-Petitioner, an operation consisting of 30 mixer trucks, provides services Monday through Friday for large, commercial customers which receive such services on credit whereas Harbor Ready Mix, consisting of six mixer trucks, services the smaller customer, 70 percent of whom are homeowners, on a one-time, cash basis, and performs between 25 percent and 30 percent of its work on Saturdays. The record also reveals that while the ready mix drivers employed by Employer-Petitioner perform those duties specified in the collective bargaining agreement between the Employer-Petitioner and the Union, the ready mix drivers of Harbor Ready Mix, among whom are included the general manager, his assistant, and the office secretary, perform a variety of other duties, including the solicitation of new customers, batching the concrete into mixer trucks, inventorying of supplies and dispatching trucks.

There are no common personnel nor has there been any exchange of employees between Harbor Ready Mix and Employer-Petitioner, and all business transactions

between the two entities have been at arms length. In this regard, for example, the record discloses that Employer-Petitioner and Harbor Ready Mix negotiated a lease on a batch plant and six mixers by having the manufacturer of these items assess the fair market value of that equipment.

With respect to the day-to-day operations of Harbor Ready Mix, the autonomy exercised by Mann at the inception of Harbor Ready Mix's operations has continued uninterrupted. Other than commenting once a month on Harbor Ready Mix's monthly financial report, Central Supply Company's management plays no role in Harbor Ready Mix's business and personnel decisions, except that when Harbor Ready Mix seeks to issue a check in excess of $10,000 it must secure, in addition to the signature of General Manager Mann, the signature of one of two members on Central Supply Company's Board of Directors.

For all the foregoing reasons, and based on the record as a whole, it is concluded that the Employer-Petitioner and Harbor Ready Mix are not a single employer or alter egos of one another. *Aspen Leasing System*, 271 NLRB 1536 (1984). As such, the Employer-Petitioner's contractual unit will be clarified to exclude form it all employees of Harbor Ready Mix. *Germantown Development Co., Inc.*, 207 NLRB 586 (1973); *Woolwich, Inc.*, 185 NLRB 783 (1970).

## ORDER

IT IS HEREBY ORDERED that the collective bargaining unit set forth in the Employer-Petitioner's cur-

rent collective bargaining agreement with the Union be, and it hereby is, clarified to exclude from it all employees employed by Harbor Ready Mix.

## RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, a Request for Review of this Decision and Order may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Ave. N.W., Washington, D. C. 20570. This Request for Review must be received by the Board in Washington, D. C. by March 25, 1986.

DATED AT Oakland, California, this 12th day of March, 1986.

/s/ James S. Scott,
Regional Director
Region 32
National Labor Relations Board
32-0713

Supreme Court, U.S.
FILED
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CLERK

No. 88-618

# In the Supreme Court of the United States

OCTOBER TERM, 1988

GRANITE ROCK COMPANY, a Corporation,
Petitioner,

v.

BUILDING MATERIALS AND CONSTRUCTION
TEAMSTERS LOCAL 216,
Respondent.

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR BUILDING MATERIALS AND CONSTRUCTION TEAMSTERS, LOCAL 216 IN OPPOSITION

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## QUESTION PRESENTED

In affirming a federal district court's order directing arbitration of a dispute as to whether Plaintiff had violated an implied covenant in a collective bargaining agreement, the court below rejected Petitioner's contention that arbitration could not be directed in the absence of a judicial finding that there was a plausible basis in the agreement for the implied covenant. The question presented is whether the court below, in declining to inquire into the merits of the Respondent Union's interpretation of the agreement, conformed to established standards for determining arbitrability as reaffirmed by this Court in *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643 (1986).

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# In the Supreme Court of the United States

OCTOBER TERM, 1988

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TEAMSTERS LOCAL 216,
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*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR BUILDING MATERIALS AND CONSTRUCTION TEAMSTERS, LOCAL 216 IN OPPOSITION TO PETITION

### STATEMENT OF THE CASE[1]

Petitioner Granite Rock Company, hereafter referred to as Granite, is located in Northern California where it is engaged in various business operations in the construction industry, including the manufacture and sale of readymix concrete (Pet. App.5). Granite and the Respondent Union are parties to the

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[1] Respondent is satisfied with the statements in the Petition relating to the Opinions Below, Jurisdiction, and the Statutory Provisions Involved (Pet., pp. 1-2), and accordingly this Opposition does not repeat the information there supplied. See Rule 34.1(d)(e) and (f) and Rule 34.2 of this Court's Rules of Practice.

same multi-employer, multi-union collective bargaining agreement, but during the events in this case Granite did not have a readymix operation within the Union's geographical jurisdiction (*ibid.*).

Granite is a family corporation. During the events in this case only one member of the family, Betsy Woolpert, was active in the business affairs of the corporation, whose shares were held by Ms. Woolpert, her husband, her two sons, and the estate of her sister (E.R. 238-240, 244).[2] In 1985 Granite's shareholders established a new readymix concrete operation in San Mateo County, California, which lies within the Union's jurisdiction (Pet. App.45). This was accomplished by the reactivation of a dormant corporation, called Central Supply Company, which had previously merged with Granite but at the time was inactive and without assets (*ibid.*). Shares of the reactivated corporation were issued in equal amounts to Granite's shareholders, and the new business, using the name Harbor Ready Mix, was capitalized through a bank loan secured by a line of credit guaranteed by Granite (Pet. App. 5, 45; E.R. 248-251).

After Harbor Ready Mix began operations the Union filed a grievance alleging that the new business was an alter ego of Granite, and that Granite had violated the collective bargaining agreement by not applying to it the economic and hiring provisions of the agreement and by not recognizing the Union as the representative of Harbor's employees (Pet. App.5-6). Granite refused to process the grievance, and filed

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[2] The symbol "E.R." refers to Excerpts of the Record prepared for the court below in accordance with its Rules. Facts described in the text of this Opposition for which "E.R." supporting references are made have not been disputed in the proceedings below, and accordingly Respondent has not requested that the relevant portions of the record be transmitted to this Court pursuant to Rule 19.1.

a unit clarification proceeding with the National Labor Relations Board, requesting a determination that Harbor's employees were not covered by the bargaining unit described by the agreement to which Granite and the Union were signatories (Pet. App.6). Shortly before the hearing in the Board case, the Union filed the complaint in the instant action, seeking to compel Granite to comply with the grievance and arbitration provisions of the collective bargaining agreement in order to resolve the grievance which it had filed (*ibid.*).

Before the issue in this case was presented to the District Court, the Regional Director of the Board issued his decision in the unit clarification case, clarifying the contractual bargaining unit by excluding "from it all employees employed by Harbor Ready Mix" (Pet. App. A-47). The Regional Director's decision recognized the common ownership of Granite and Harbor (Central Supply Company), but found that the two businesses were nonetheless separately managed and operated, and that Granite did not substantially intrude into Harbor's business affairs (Pet. App.46-47).

When this case was thereafter brought before the District Court upon cross motions for summary judgment, the Union conceded that the Board's Regional Director's decision was controlling with respect to the alter ego issue, and that the Union was precluded from grieving Granite's refusal to apply the terms of the collective bargaining agreement to Harbor's employees (Pet. A.7). The Union asserted to the District Court, however, that the unit clarification decision "does not encroach upon the contention, which is encompassed within [the Union's] grievance, that the collective bargaining agreement forbids [Granite] from establishing a new and separate entity to which it does not apply the hiring and economic provisions of the agreement" (E.R. 87; see Pet. App.7). The District Court agreed with the Union's position,

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v.

BUILDING MATERIALS AND CONSTRUCTION
TEAMSTERS LOCAL 216,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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No. 88-618

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GRANITE ROCK COMPANY, a corporation,
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v.

BUILDING MATERIALS AND CONSTRUCTION TEAMSTERS LOCAL 216,
*Respondent*.

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## MOTION OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Associated General Contractors of America, Inc. (hereinafter "AGC"), respectfully moves this Court, pursuant to Supreme Court Rule 36, for leave to file the enclosed brief *amicus curiae* in support of the petition for a writ of certiorari in this proceeding. In support of this motion, AGC states as follows:

1. Pursuant to Supreme Court Rule 36, AGC requested the consent of the parties to file the enclosed brief *amicus curiae*, and received the consent of the Petitioner but not of the Respondent. Although motions for leave to file briefs *amicus curiae* in support of petitions for writs of certiorari, without consent of all parties, is not favored under the Court's rules, AGC's extensive involvement in collective bargaining with the building trades unions makes AGC uniquely situated to provide assistance to this Court on the issues raised by this proceeding.

2. Founded in 1918, AGC is a private, non-profit trade association that regularly represents the interests of construction contractors throughout the United States. AGC counts approximately 8,000 of the nation's leading general construction contractors among its approximately 32,500 members. These contractors are engaged in all forms of commercial construction, from highways and bridges, to commercial buildings, to industrial facilities. Annually, AGC members perform approximately 80% of the total volume of all contract construction in the United States.

3. AGC represents the vital interests of its members in selected cases before the courts, the United States Congress and the executive and independent regulatory agencies of the federal government. This includes assistance to courts in their deliberations on significant labor-management relations and related matters. As an *amicus curiae*, AGC participated in *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375 (1982), and *DeBartolo v. NLRB*, 463 U.S. 147 (1983).

4. AGC has 104 local chapters, with at least one chapter in each of the fifty states and one chap-

ter in Puerto Rico. These chapters represent the interests of AGC members at the state and local level. Petitioner Granite Rock Co. is an Associate Member of the AGC of California and a National Associate Member of AGC of America.

5. The vast majority of AGC chapters provide collective bargaining services to AGC members. Some actually negotiate collective bargaining agreements as the agent of the construction contractors in their respective areas. Other chapters may coordinate collective bargaining, but not get directly involved. Still others simply provide informational or administrative services.

6. Although AGC's current membership includes many open shop contractors, AGC is strongly committed to the collective bargaining process. Consistent with this position, numerous AGC contractors have entered into collective bargaining agreements, the vast majority of which contain a standard arbitration provision.* AGC contractors have entered into such agreements in reliance on the federal labor policy, as previously enunciated by this Court, that only those disputes that the parties have contractually agreed to arbitrate are subject to arbitration.

7. AGC has a vital interest in review of the Ninth Circuit's decision, because that decision, if left undisturbed, would detrimentally affect many AGC chapters that negotiate multiemployer agreements with the building trades unions on behalf of AGC members. It would also adversely affect AGC members that negotiate with the building trades unions on an individual basis. Although

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* A recent survey conducted by the Construction Labor Research Council shows that 1,253 of the 1,445 construction labor agreements in its database contain arbitration provisions.

the decision below is inconsistent with the applicable decisions of this Court and the decisions of other circuits, it has nevertheless created great concern that the building trades unions will be in a position to compel arbitration of labor disputes without regard to the parties' intent simply by alleging the violation of an "implied covenant." This concern could discourage agreements to arbitrate disputes and adversely impact collective bargaining in the industry as a whole.

For the foregoing reasons, AGC respectfully requests that (1) this motion for leave to file brief *amicus curiae* in support of the Petition for a writ of certiorari be granted; and (2) that the enclosed brief *amicus curiae* be accepted for filing.

Respectfully submitted,

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## QUESTION PRESENTED

Whether a standard arbitration clause in a collective bargaining agreement, limited to disputes that arise under the agreement, compels the arbitration of every act or omission that is alleged to violate an "implied covenant" of the agreement, without regard to the intent of the parties at the time that they entered into the agreement.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

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No. 88-618

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GRANITE ROCK COMPANY, a corporation,
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v.

BUILDING MATERIALS AND CONSTRUCTION TEAMSTERS LOCAL 216,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF AMICUS CURIAE OF ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN SUPPORT OF PETITIONER

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The Associated General Contractors of America, Inc., respectfully submits this brief in support of the petition for a writ of certiorari filed in No. 88-618 to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 11, 1988.*

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* Amicus accepts the Petitioner's statement of the case.

## INTEREST OF AMICUS

The foregoing motion for leave to file as an *amicus curiae* fully states AGC's interest in the question presented.

## SUMMARY OF THE REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision on the role of the judiciary in cases brought to compel labor arbitration conflicts with the decisions of this Court in *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960), *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), and *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643 (1986). In addition, the Ninth Circuit's failure to engage in a preliminary analysis of the union's grievance, to determine whether it "arises under" the substantive terms of the collective bargaining agreement, is impossible to reconcile with the decisions of the Third and the Eleventh Circuits. If left undisturbed, the decision of the lower court will require arbitration whenever a collective bargaining agreement contains a standard arbitration clause and one of the parties claims a violation of an "implied covenant." Either party can compel the arbitration of any issue, including issues that the parties never intended to arbitrate.

The result is great uncertainty in the administration of current labor agreements and unnecessary difficulty in the negotiation of new ones. Over time, the lower court's decision will threaten the stability of labor-management relations, as both unions and employers seek alternative methods of dispute resolution and arbitration loses its current importance in the maintenance of industrial peace. A decision with such detrimental consequences for our federal labor policy should not be permitted to stand.

## REASONS FOR GRANTING THE WRIT

### I. The Ninth Circuit's Decision Conflicts with the Applicable Decisions of this Court and the Decisions of Other Circuits.

The Ninth Circuit's decision conflicts with the body of law that has grown out of this Court's decisions in *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960), *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (hereinafter the "*Steelworkers Trilogy*"), including this Court's later decision in *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643 (1986) (hereinafter "*AT&T*").

The Ninth Circuit's refusal to go beyond the wording of the union's grievance, to question whether the grievance did, in fact, arise under the terms of the collective bargaining agreement, also conflicts with decisions that have emerged from other circuits. Contrary to the Ninth Circuit, the Third Circuit, in *Morristown Daily Records v. Graphic Communications Union, Local 8N*, 832 F.2d 31 (3d Cir. 1987), and the Eleventh Circuit, in *Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 327 F.2d 709 (11th Cir. 1987), have correctly recognized that the courts are to decide whether any one grievance falls within the scope of a labor arbitration clause.

In the *Steelworkers Trilogy*, this Court developed the framework for the modern law of labor arbitration. This Court had already acknowledged the importance of arbitration, as a mechanism for promoting the government's interest in industrial peace, while honoring the preference of both labor and management for the private resolution of their disputes. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). This Court proceeded, in the *Steelworkers Trilogy*, to advance arbitration as an effective alternative to industrial strife. The

*Steelworkers Trilogy* established a strong presumption of arbitrability, going so far as to require labor and management to utilize contractually created arbitration procedures "unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 582-583. This Court did not, however, permit the policies that favor labor arbitration to obscure the contractual nature of the parties' obligations. To the contrary, the *Steelworkers Trilogy* emphasized that arbitration is exclusively a matter of contract, and that whether the parties have agreed to arbitrate a particular dispute remains a question for the courts, and not the arbitrators, to decide. This Court later explained, in *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-547 (1964):

> Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court on the basis of the contract entered by the parties. . . . [T]he duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.

To be sure, this Court has cautioned that in deciding whether disputes are subject to arbitration, the lower courts are to avoid any unnecessary intrusion into the merits of the dispute. This Court has, in effect, required the lower courts to weigh the contractual basis for labor arbitration against the presumption of arbitrability. The Ninth Circuit's decision nevertheless merits review, and indeed, reversal. The lower court did not simply fail to strike the appropriate balance; the court made no effort to balance the competing considerations.

The Ninth Circuit completely severed the question of arbitrability from the parties' intent, and relied entirely

on the presumption of arbitrability. If the decision of the lower court is correct, then the presumption has become an irrebuttable rule of law that requires the arbitration of all acts or omissions that breach allegedly "implied covenants" of collective bargaining agreements that include standard arbitration clauses.

In *AT&T*, the Seventh Circuit had yielded to a similar —though less extreme—emphasis on the presumption of arbitrability. In order to avoid any intrusion into the merits of the parties' dispute, the Seventh Circuit proposed to require arbitration of the scope of the arbitration clause whenever the collective bargaining agreement contains a standard arbitration clause, the parties have not clearly excluded the dispute from arbitration, and a court decision on the arbitrability of the dispute would entangle the court in the substantive provisions of the agreement.

Expressing its clear disagreement with the Seventh Circuit's approach, this Court declared it "evident" that the Seventh Circuit had "erred," because the judiciary must decide whether labor and management are contractually bound to submit a dispute to arbitration, even if that risks substantive involvement. Emphasizing the lower courts' duty to determine whether the parties to a collective bargaining agreement intended to arbitrate a dispute, this Court also cautioned that both labor and management would be far less willing to enter into agreements requiring arbitration if labor arbitrators had the power to determine their own jurisdiction. Commenting on the potentially adverse consequences of the Seventh Circuit's approach, this Court stated:

> Were this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but instead, would be empowered to impose obligations outside the contract limited only by his understanding and conscience. [*AT&T*, 475 U.S. at 651,

quoting Cox, *Reflections upon Labor Arbitration*, 72 Harv. L. Rev. 1436, 1509 (1509).][1]

The facts of the instant case are even more compelling than the facts of *AT&T*. In the instant case, the union alleged that Granite Rock had violated an "implied covenant" in the parties' collective bargaining agreement. The union has conceded, however, that the alleged covenant has no nexus with the express provisions of the agreement, the parties' bargaining history, the parties' past practice, or any other factual circumstance. The Ninth Circuit held that the district court had correctly compelled arbitration simply because the grievance appeared, on its face, to involve an interpretation of the collective bargaining agreement.

In fact, the grievance presupposed a duty that the federal common law of collective bargaining agreements has never implied into these agreements. Elevating the form of the union's grievance over its substance, the Ninth Circuit wrongfully deprived Granite Rock Co. of its right to an independent judicial determination of the scope of the arbitration clause, and authorized the arbitrator, in effect, to create new federal common law.

It is submitted that the Ninth Circuit's decision also conflicts with the Third and Eleventh Circuits' interpretations of the *Steelworkers Trilogy* and *AT&T*. In *Morristown Daily Records v. Graphic Communications Union, Local 8N*, 832 F.2d 31 (3d Cir. 1987), the Third Circuit found that the district court had referred the threshold issue of arbitrability to the arbitrator. Reversing the district court, the Third Circuit candidly recognized that the governing principles are sometimes difficult to apply, but sought no license to disregard *AT&T*, finding that:

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[1] The *AT&T* Court reasserted that labor arbitration is an important means of peacefully resolving industrial disputes, but it did not refer to the language that the *Steelworkers Trilogy* had used to describe the presumption of arbitrability.

> The message is clear that courts must carefully analyze the contractual language to determine whether a particular dispute is arbitrable. Although answering that question may entail some probing of preliminary substantive issues, that requirement will not relieve courts of the duty to decide arbitrability. [*Id.* at 33-34.]

The *Morristown* court also noted that the Third Circuit had already rejected the proposition that the form or phrasing of a grievance is dispositive. Rather, in the Third Circuit's view, a decision on the arbitrability of a particular dispute requires at least some consideration of the substance of the grievance. As that court stated, "we must first isolate the nature of the dispute." *Id.* at 34, citing *Radio Corporation of America v. Association of Scientists & Professional Engineering Personnel*, 414 F.2d 893, 895 (3d Cir. 1969).

The Eleventh Circuit expressed a similar view in *Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 327 F.2d 709 (11th Cir. 1987). Recognizing that the lower courts' role in cases brought to compel arbitration remains limited, and often requires the lower courts only to decide whether the claim is "on its face governed by the contract," *American Manufacturing Co.*, 363 U.S. at 568, the Eleventh Circuit nevertheless struck the appropriate balance:

> The parties' broad arbitration clause is not limitless. The presumption favoring arbitration, *AT&T Technologies*, 106 S. Ct. at 1419, cannot swallow the underlying foundation for arbitration: the dispute to be arbitrated must involve construction of the substantive provisions of the contract. [*Id.* at 714.]

The court further observed:

> The union attempts to sidestep the requirement that the dispute concerns an obligation created by the contract by asserting that there is no dispute concerning the union's acceptance. We conclude other-

> wise. . . . [T]he collective bargaining agreement creates no obligations concerning acceptance. There simply is no dispute as to the construction of a clause of the contract with regard to acceptance because no such clause exists. [*Id.*]

The Ninth Circuit's departure from the prior interpretations of the *Steelworkers Trilogy*, in the Third and Eleventh Circuits, seriously threatens the uniformity of the modern law of labor arbitration. Given a standard arbitration clause, the Ninth Circuit's decision compels arbitration whenever the grieving party frames its grievance as a substantive violation of an "implied covenant" of a collective bargaining agreement. By contrast, the Third and Eleventh Circuits remain unwilling to rely entirely on the wording of a grievance. The latter require at least some factual foundation for the grievant's claim that the collective bargaining agreement grants the substantive right being asserted. In the instant case, the Third and Eleventh Circuits would have undoubtedly found it significant that no express provision of the parties' agreement grants the substantive right that the union asserts. In all likelihood, they would have required at least a preliminary inquiry into the parties' bargaining history, or their past practice.

AGC respectfully submits that this Court must review the Ninth Circuit's decision, in order to resolve the conflict between that decision and the decisions of both this Court and other circuits. If left undisturbed, the Ninth Circuit's decision will deprive both labor and management of the uniform application of our federal labor law.

### II. The Ninth Circuit's Decision Creates Great Uncertainty Over the Scope of Current Labor Agreements, and Will Complicate the Negotiation of New Agreements.

The union has advanced the open-ended theory that Granite Rock Co. agreed to arbitrate all disputes that might grow out of covenants implied, not by any set

of facts, but by federal common law. This theory is unconstrained by the text of the collective bargaining agreement, the bargaining history of the parties, the past practice of the parties, or even any readily discernible notion of public policy.[2] When the Ninth circuit endorsed this theory, it therefore left both labor and management without any readily discernible means to determine the precise scope of their current collective bargaining agreements. The Ninth Circuit also greatly complicated the negotiations for new agreements. The lower court's decision will not only make the administration of current agreements difficult, but also cause negotiations for new agreements to dwell on issues long thought settled. If allowed to stand, the Ninth Circuit's decision will compel labor and management to revise their arbitration clauses, or to accept that arbitrators have suddenly acquired the authority to rewrite the substantive terms of their collective bargaining agreements.

With this Court's endorsement, arbitration has become a cornerstone of labor-management relations, and a key to industrial peace. The parties to the collective bargaining process have widely embraced arbitration in reliance upon the principles first enunciated in the *Steelworkers Trilogy*. These principles long appeared to ensure that neither labor nor management would be compelled to arbitrate matters that they had not agreed to arbitrate. In the instant case, the Ninth Circuit blinded itself to all but the form of the union's grievance, and reached a re-

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[2] The 100th Congress recently rejected a proposal to amend the National Labor Relations Act (hereinafter "NLRA") to forbid individuals from investing in both union and open shop construction companies. See H.R. 281, 100th Cong., 2d Sess. (1988) and S. 492, 100th Cong., 2d Sess. (1988). Whether Section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4), actually forbids covenants to avoid these investments is currently pending before the National Labor Relations Board in *Painters and Allied Trades District Council No. 51 and Manganaro Corp., et al.* Cases 5-CC-1036, 5-CB-4687, 5-CC-1033 and 5-CB-4689.

sult that the parties clearly did not contemplate. The Ninth Circuit has therefore undermined the longstanding principles that have encouraged standard arbitration clauses. If left standing, the decision will require the parties to specify in great detail any matter which they wish to exclude from arbitration. At a minimum, the decision will greatly prolong negotiations. Many parties may withdraw their commitment to arbitration completely, choosing instead to rely on judicial intervention or simple self-selp. This would, of course, have the tendency to destabilize labor-management relations by increasing the likelihood of future labor disputes. The great irony is that the Ninth Circuit's expansive decision could primarily serve to undermine longstanding commitments to labor arbitration, as the preferred method of resolving industrial disputes.

The Ninth Circuit's decision will also have a significant impact on the administration of current labor agreements. The facts of the instant case are illustrative. Here, simply because the parties' collective bargaining agreement contains a standard arbitration clause (limiting arbitration to disputes "arising under the contract"), the union has succeeded in compelling the arbitration of an issue that the parties never discussed. Granite Rock had no way to know that the arbitration clause that it signed would be construed to reach the union's grievance. In arriving at its decision, the lower court undertook no preliminary analysis to determine the parties' intent. Instead, it relied on the union's wholly unsupported assertion that Granite Rock had made an "implied covenant" to sharply limit, if not completely avoid, any investment in an open shop company that would compete with other signatories to the same collective bargaining agreement.

If left undisturbed, the decision below will cast great doubt on the scope of current collective bargaining agreements, and complicate the negotiation of new agreements.

The need for stable labor-management relations is sufficient, in itself, to justify this Court's review of that decision.

## CONCLUSION

For the foregoing reasons, AGC respectfully requests this Court to grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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No. 88-618

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1988

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GRANITE ROCK COMPANY,
*Petitioner,*

v.

BUILDING MATERIALS AND CONSTRUCTION
TEAMSTERS LOCAL 216,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF FOR ASSOCIATED BUILDERS AND CONTRACTORS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF FOR ASSOCIATED BUILDERS AND CONTRACTORS, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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### INTEREST AND CONCERN OF THE AMICUS

*Amicus Curiae* Associated Builders and Contractors, Inc. ("ABC") hereby submits this brief in support of the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.[1] ABC urges the Court to reverse the decision of the Ninth Circuit which has unjustifiably un-

[1] This brief is filed with the written consent of the parties. The letters of consent have been filed with the Court Clerk.

dermined this Court's long held rule that a court must decide in the first instance whether two parties have contractually agreed to arbitrate a labor dispute before ordering the parties to arbitrate an issue which on its face does not arise from the contract. If allowed to stand, the Ninth Circuit's decision will disrupt established precedent under the Labor Management Relations Act.

ABC is a national trade organization representing more than 19,000 construction industry contractors and related firms. A significant proportion of ABC's members are non-unionized, "merit shop" contractors. ABC members are affected by judicial and administrative decisions construing the legitimacy of open shop operations, and by attempts to extend the scope of collective bargaining agreements to employers and employees who are not intended to be covered under such contracts. Thus, ABC members are vitally interested in the decision in the case below wherein the Ninth Circuit is permitting a union to obtain an arbitration over the existence of an allegedly "implied" covenant that restricts a signatory employer's right to maintain a non-union entity, notwithstanding the absence of any contract language to that effect. Those of ABC's members who have heretofore maintained legally separate union and non-union entities are faced with the prospect of having to arbitrate the existence and/or application of similar "implied" anti-double-breasting covenants even where the NLRB has explicitly sanctioned such operations, and even where no collective bargaining agreement prohibits such double-breasted operations. The Ninth Circuit's decision could permit an arbitrator to require one employer to apply the economic terms of its collective bargaining agreement to employees of a wholly separate and distinct non-union employer, thereby conflicting with settled federal labor policy. ABC is interested in a uniform and orderly application of the labor laws, and urges reversal of the Ninth Circuit's decision.

## SUMMARY OF THE ARGUMENT

ABC fully supports the arguments put forth by petitioner Granite Rock in this Court, endorses those arguments, and amplifies upon them herein. By requiring a party to arbitrate a claim couched as a dispute "implicitly" arising under a collective bargaining agreement, without a showing that the claim falls within the scope of the parties' agreement, the Ninth Circuit has undermined the elementary rule that no party may be compelled to arbitrate an issue unless the court determines that the dispute is arbitrable under the parties' contract. According to the Ninth Circuit, any party to a collective bargaining agreement is entitled to a court order compelling arbitration of any asserted dispute between the parties, real or imagined, even disputes which cannot find their genesis in the collective bargaining agreement. According to the Ninth Circuit's standard, the courts must order to arbitration claims where the party seeking arbitration merely avers that the basis for the asserted dispute is implicit in the agreement, without even referring the court to any language in the agreement which even purportedly supports arbitrability. ABC respectfully requests the Court either to reverse the Ninth Circuit or to grant certiorari to address issues which are of paramount concern to the uniform application of this nation's labor laws.

## ARGUMENT

**The Ninth Circuit's Decision Compelling Arbitration Over The Existence Of An Asserted Implied Covenant Prohibiting Double-Breasting By A Unionized Company Conflicts With Federal Labor Policy.**

Based on the fundamental notion of freedom of contract, this Court has recently reaffirmed the long held principle that the obligation to arbitrate a particular labor dispute is purely a matter of contract. *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643 (1986). *See also United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); and *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). These decisions hold that a court is powerless to compel a party to arbitrate a given dispute absent a contractual undertaking to that effect, and consequently, the courts are obligated to decide in the first instance whether a contractual obligation to arbitrate the asserted dispute exists:

> The first principle gleaned from the Trilogy is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he had not agreed so to submit." This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.

*AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 648-49 (1986) (citations omitted). It necessarily follows that the question whether a collective bargaining agreement creates a duty for the parties to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by a court on the basis of the contract entered into by the parties. *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962).

Where the parties agree to submit all questions of contract interpretation to arbitration, the courts are "confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *American Mfg. Co., supra*, 363 U.S. at 568. Although there is a strong presumption in favor of arbitration where the agreement contains a broad arbitration clause, *Warrior & Gulf Navigation Co.*, it is nonetheless the duty of the courts to interpret the agreement and to determine whether the parties intended to arbitrate the grievance presented. *AT&T Technologies, supra*, 475 U.S. at 649. The Court has held that the asserted claim sought to be arbitrated must in some fashion be based upon the contract. In *American Mfg. Co.*, the Court acknowledged that the union's claim that the company had violated *a specific provision of the contract*, coupled with the company's contention that it had not violated the particular provision, amounted to a "dispute between the parties as to the 'meaning, interpretation and application' of the collective bargaining agreement" requiring arbitration. *American Mfg. Co., supra*, 363 U.S. at 569. Similarly, in *Warrior & Gulf*, the Court held that a grievance claiming that the company exceeded its rights under the management rights' clause by contracting out work was arbitrable as the "grievance alleged that the contracting out was a violation of the collective bargaining agreement." *Warrior & Gulf Navigation Co., supra*, 363 U.S. at 585.

The Court has never instructed the lower courts to totally ignore the nature of the asserted dispute before ordering the dispute to arbitration. Indeed, the Court has directed that the dispute be judicially analyzed to ensure that it is one that the parties contemplated as being subject to the arbitration procedure.

In the case below, however, neither the Ninth Circuit nor the district court made any such assessment. Instead, the Ninth Circuit erroneously endorsed the district court's

determination that the parties' dispute as to whether any implied covenant even *existed* in the agreement satisfied the court's threshold arbitrability obligation. Consequently, the Ninth Circuit refused to even consider whether the asserted dispute—an implied covenant that the employer agreed not to establish another company without observing the economic provisions of the agreement—was governed by the contract. According to the decision of the Ninth Circuit, a party to an agreement is entitled as a matter of law to arbitrate literally any issue, including issues which are not founded on the agreement itself, simply by stating that some nebulous, unidentified and unsupported "implied" covenant in the agreement was violated. If allowed to stand, the Ninth Circuit's holding would render every conceivable issue, including issues that would otherwise not require arbitration, subject to mandatory arbitration.

Fortunately, other Circuit courts have not been as lenient in determining threshold arbitrability. The Third and Eleventh Circuits have rejected such novel attempts by parties to compel arbitration of otherwise non-arbitrable issues. In so doing, those Circuits have expressly evaluated the asserted disputes to ensure that the parties at least contemplated that such disputes be subject to arbitration. These Circuits refused to compel arbitration where the party seeking arbitration was unable to point to a provision in the agreement which on its face governed the dispute. *See Montgomery Mailers' Union No. 127 v. Advertiser Co.*, 827 F.2d 709, 714 (11th Cir. 1987) (refusing to compel arbitration where the agreement contained no terms or provisions to be construed governing the asserted dispute) and *Morristown Daily Record v. Graphic Communications Union, Local 8N*, 832 F.2d 31, 33-34 (3d Cir. 1987) ("courts must carefully analyze the contractual language to determine whether a particular dispute is arbitrable").

Enabling an arbitrator to read implied covenants into any collective bargaining agreement will have a profound effect on virtually every collective bargaining agreement subject to the federal labor laws. In the present context, the Ninth Circuit's decision authorizes an arbitrator to find that an employer is prevented from engaging in double-breasting which the NLRB has expressly sanctioned. The decisions of other circuits, cited above, would avoid such a result by requiring the lower courts to permit arbitration only where there are contractual terms or provisions to be construed. The Court should resolve the conflict among the circuits by reversing the Ninth Circuit's decision, so as to avoid expanding the scope of collective bargaining to reach entities not properly within the coverage of union contracts.

Absent reversal by this Court, employers in the Ninth Circuit will be extremely reluctant to agree to *any* grievance/arbitration provision in a labor agreement out of fear that the union will allege, as was done in the case below, that some undefined "implied" covenant exists which requires arbitration. Such a result would be contrary to the Congressional policy favoring arbitration. Moreover, replacing Congress and the courts would be a system of arbitration not based on the specific language of the collective bargaining agreement, but on an arbitrator's personal belief as to whether various implied covenants exist in bargaining agreements. Thus, it is clear that the Ninth Circuit's decision operates to thwart, rather than to foster, national labor relations policies.

## CONCLUSION

The Ninth Circuit's holding in this case threatens to disrupt the collective bargaining scheme that Congress and this Court have articulated to foster labor relations. If allowed to stand, the Ninth Circuit's decision will lead to a proliferation of demands to arbitrate asserted "implied" covenants, thereby expanding the scope of collec-

tive bargaining agreements beyond the intent of the parties and in a manner which would conflict with the statutory right to establish separate, non-union entities.

For the reasons expressed herein, this Court should grant the Petition for Writ of Certiorari and should reverse the decision below.

Respectfully submitted,

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